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Supreme Court of the United States

OCTOBER TERM, 1940

THE UNITED STATES OF AMERICA,
Appellant,

v.

FRED W. DARBY,
Appellee.

No. 82

Appeal from the District Court of the United States
for the Southern District of Georgia

BRIEF FOR APPELLEE

ARCHIBALD B. LOVETT,
R. BASIL MORRIS,
ROBERT M. HITCH, JR.,
MALBERRY SMITH, JR.,
Attorneys for Appellee.

17 Drayton Street,
Savannah, Georgia.

Review Printing Co., Savannah, Ga.

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BRIEF FOR APPELLEE

Appellee, operating a local sawmill in the State of Georgia, under the trade name of F. W. Darby Lumber Company, was indicted for alleged violations of the *Fair Labor Standards Act of 1938* (52 Stat. 1060, U. S. C., Title 29, §§201, *et seq.*). A demurrer and motion to quash the indictment on constitutional grounds having been sustained in the District Court, the Government has taken this appeal direct to this Court.

The constitutional questions raised by the demurrer, and now insisted upon, relate to the power of Congress

under the commerce clause to enact the legislation so as to bring the activities of the appellee under the terms of the Act, and also involve the Fifth and Tenth Amendments.

Opinion Below.

The opinion of the Court below, (R. 16), is reported in 32 F. Supp. 734.

Jurisdiction.

The judgment below was entered May 6, 1940, (R. 21). The order allowing appeal was filed May 13, 1940, (R. 22), and probable jurisdiction noted June 3, 1940. The jurisdiction of this Court is based upon the Criminal Appeals Act (U. S. C., Title 18, §682) and §238 of the Judicial Code as amended (U. S. C., Title 28, §345).

Statement.

The statement of the case in the brief of the Government is correct and no additional statement need be made by appellee.

The fundamental and basic issues in the case at bar are, first, the sufficiency of the indictment in bringing the activities of appellee within the operative sphere of the *Fair Labor Standards Act of 1938*, and, secondly, the constitutionality of the statute if his activities are regulated thereby. The determinative allegations of the indictment insofar as they bear upon appellee's relation to interstate commerce read: "A

large proportion of the lumber bought, procured, obtained, produced, and manufactured by the defendant was bought, procured, obtained, produced, and manufactured by him pursuant to orders received by the defendant from customers without the State of Georgia. The said lumber was bought, procured, obtained, produced, and manufactured with the intent on the part of the defendant that the said lumber after having been bought, procured, obtained, produced, and manufactured would be sold, shipped, transported, and delivered to and the said lumber was sold, shipped, transported, and delivered to customers without the State of Georgia." (R. 2)

The provisions of the statute (52 Stat. 1060, U. S. C., Title 29, §§201, *et seq.*) are set out in full in Appendix A of the brief of the Government.

ARGUMENT

I.

The Fair Labor Standards Act of 1938 is an unconstitutional attempt to regulate conditions in production of goods and commodities, and it can not be sustained as a regulation of interstate commerce within the delegated power of the Congress under the commerce clause. It violates the Tenth Amendment.

(a) Introduction.

The Act represents an undisguised attempt on the part of the Federal Government to establish minimum wages and maximum hours throughout the industries

of the entire nation. Its scope is unparalleled,[1] and its pattern has no exact precedent in legislative history. It embraces within its humanitarian aims the establishment of a single nation-wide standard of working conditions, the prevention of unfair competition from employers who have manufactured low-cost goods with low-cost labor, and the general promotion of economic stability by an increase in purchasing power.

The generating power to enact this legislation is sought in the commerce clause of the Constitution of the United States.

Following the recently developed technique, Congress has attempted to bolster the exercise of the power by specific legislative findings. Section 2 of the Act enumerates these findings in detail. The declared evil aimed at by the statute is the existence of detrimental labor conditions in industries engaged in commerce or in the production of goods for commerce. The

1. The extent of the applicability of the Act is indicated by the following definitions in §3:

"(i) 'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or *subjects of commerce of any character, or any part or ingredient thereof*, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

"(j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, *or in any process or occupation necessary to the production thereof*, in any State." [italics supplied]

results flowing from this condition are defined in five conclusions. First, Congress finds that commerce and its channels are being used to spread these conditions; secondly, it contends that commerce is being burdened; thirdly, it maintains that unfair competition results therefrom; fourthly, labor disputes are said to arise from the condition; and lastly, it is found that detrimental labor conditions prevent the fair and orderly marketing of goods in commerce.[2]

(b) The origin of the commerce clause, the nature of our constitutional system, and the course of judicial decisions do not support the construction urged by appellant.

The historical background and origin of the commerce clause and the development of constitutional doctrine under it have been discussed at considerable length in the brief of the Government. Although the Government's discussion of the proceedings of the Constitutional Convention of 1787 are, in the main, thorough and correct, the accompanying analysis con-

2. "Findings and Declaration of Policy

"Sec. 2. (a) The Congress hereby finds that the existence in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

"(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power."

tains misleading implications and is likely to leave erroneous impressions in its wake. The statement in the final sentence on page 44 of the Government's brief, following as it does the contrast in the statement of legislative powers in the resolutions of Randolph and of Patterson, implies that the New Jersey Plan was rejected because of the discrepancies between its provision for a Federal power over matters of trade and commerce and the broad provisions for legislative powers in the Virginia Plan. We submit that the conclusion is without substantial support.

Constitutional historians have written at great length on the proceedings of the Constitutional Convention of 1787. Their research and consideration of the available source materials indicate that more general objections led to the ultimate rejection of the New Jersey Plan. It[3] sought to establish a Federal system patterned after the Articles of Confederation.[4] In contrast, the Virginia Plan[5] had as its basic design a National Government, supreme in its sphere and free from domination or control on the part of the states. The New Jersey Plan[6] was proposed by the delegates representing the smaller states who were dissatisfied and alarmed by the provisions for Congressional representation in the Virginia Plan. They strenuously

3. Madison's *Debates in the Federal Convention of 1787* (International Ed., 1920), 102 [notes on session of Friday, June 15, 1787].
4. *Id.*, at xxxvii.
5. *Id.*, at 23 [notes on session of Tuesday, May 29, 1787]; *id.*, at 99 [notes on session of Wednesday, June 13, 1787].
6. Farrand, *The Framing of the Constitution* (1913), 84, *et seq.*

fought for an effective check upon the legislative powers of the Federal Government through the requirement that a certain number of states should concur before the legislative powers of the Federal Government could be operative. There was a general willingness, because of the obvious weaknesses in the Articles of Confederation, to grant extensive powers to the Federal Government, but specific delimitations of such powers were clearly in the minds of the delegates in the adoption of the final broad standard.[7] The recent unhappy experience of the country under the Articles had made obvious many specific defects in the plan of government therein provided.[8] The delegates were well aware of the lack of cohesion and authority in the original plan of confederation. Though believing that their plan of government would probably endure for future generations, they nevertheless confined their proposals in large part to the removal of the demonstrated defects of the Confederation. Even Randolph, who proposed the resolutions which became known as the "Virginia Plan," which contained the broad provision for legislative powers, "disclaimed any intention to give indefinite powers to the national Legislature, declaring that he was entirely opposed to such an inroad on the State jurisdictions, and that he did not think any considerations whatever could ever change his determination."[9] All of the

7. *Id.*, at 77.
8. *Id.*, at 42, *et seq.*
9. Madison's *Debates*, 36 [notes on session of Thursday, May 31, 1787].

available facts indicate that the broad standard prescribed for the drafting of specific legislative powers in the National Government was unobjectionable to and was accepted by the members of the Convention because, and only because, they had in mind possible cures for the specific defects which had come to light under the system of the Confederation. It was no surprise, therefore, that the committee of detail specifically defined the separate legislative powers in its draft of the Constitution.[10] The committee simply put in concrete form the previous tacit understanding of the delegates.

Basically, the argument of the Government would seek the establishment of an unrestricted power in the Federal Congress, in addition to the enumerated powers, to legislate for the general welfare. Despite its expressed disclaimer,[11] such is the practical effect of the argument. The existence of such a power has never been conceded and has been expressly denied in numerous cases.[12] We accept the Government's suggestion[13] that the enumerated powers should be construed in the spirit in which they were written, but we are in entire disagreement with the implications which it has drawn from the precise wording of the sixth resolution of Randolph.

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10. *Id.*, at 340-342 [notes on session of Monday, August 6, 1787].
11. Brief for the United States, at 49.
12. Cf. *United States v. Butler*, 297 U. S. 1, 64, *et seq.*; *Carter v. Carter Coal Co.*, 298 U. S. 238, 291, *et seq.*
13. Brief for the United States, at 49.

The mere words in the grant of power to Congress over commerce with foreign nations and among the several states are not self-definitive or self-executing, and do not provide an exact standard for determining their application in specific cases. Constant judicial interpretation has been required to give the words full meaning and to provide a pragmatic standard for their operation. The impact of experience, and the decisions of this Court, have convincingly justified the original grant of power over interstate commerce to the Federal Congress. The ineffectual control of the states was clearly demonstrable in this operative sphere. The inference which the Government now seeks to establish is that inadequacies in state control breed Federal power to legislate in all commercial matters. The decisions of this Court repudiate such doctrine. The Federal power is limited to "commerce with foreign nations, and among the several states."

The statements which the Government quotes from the proceedings of the state conventions called for the ratification of the Constitution[14] are general statements which apply to the constitutional plan as a whole. They have no direct application to any particular powers. With respect to the work of the Convention and the plan of government established by the Constitution, it has been well-stated:

> "The specific task which the convention * * * had before it was to remedy a series of perfectly

14. *Id.*, at 47-48.

> definite defects, each of which had revealed itself in the experience of little more than ten years. It was a time when men indulged in philosophical speculation and in political theorizing, but farmers and traders are practical people, and the compelling characteristic of the framers of the constitution was hard-headed common sense. While several of the delegates in preparation for their task read quite extensively in history and government, when it came to the concrete problems before them they seldom, if ever, went outside of their own experience and observation. * * * The constitution was a practical piece of work for very practical purposes. It was designed to meet specific needs."[15]

The Government finds that the "incomplete narration [of the history of the proceedings of the Convention in *Carter v. Carter Coal Company*, 298 U. S. 238, 291-292] leaves a wholly incorrect impression."[16] The same comment might be made of the analysis of the Government. We respectfully submit that the broad standard for legislative powers established in the resolution of the Constitutional Convention must be viewed in retrospect to the specific defects of the Confederation. The enumerated powers in the final draft of the Constitution do not lose their relationship to the specific problems which were primarily responsible for the calling of the Convention because of the broad statement in the resolution as adopted. More-

15. Farrand, *op. cit. supra* note 6, at 52, 201.
16. Brief for the United States, at 46-47, note 14.

over, the projection of the terms of a single power against the general standard is misleading in view of the diversity of powers delegated in the same Article. It should be remembered that difficulties in commercial matters were not the sole concern in the calling of the Convention,[17] so that nothing short of the complete congeries of powers conferred is a true measure of the standard prescribed.

It has already been observed that the words of the Constitution delegating power to Congress over interstate commerce are not self-executing, but require a judicial "gloss" for their understanding. Indispensable aid to their construction comes with a full consideration of the contemplated form of government. The sovereignty and individual identity of the several states were to be preserved. The grant of powers to the Federal Government was to be supplemental and not destructive. Aside from the general plan of the Constitution, the Tenth Amendment expressly safeguards the sovereignty of the states except as this sovereignty might be lessened by the powers delegated to the Federal Government. This Court, speaking through Chief Justice Chase, has said of the Union established by the Constitution:

> "* * * The perpetuity and indissolubility of the Union, by no means implies the loss of the distinct and individual existence, or of the right of self-government by the States. Under the Articles of Confederation, each State retained its sovereignty,

17. Farrand, *op. cit. supra* note 6, at 42, *et seq.*

> freedom, and independence, and every power, jurisdiction, and right not expressly delegated to the United States. Under the Constitution, though the powers of the States were much restricted, still, all powers not delegated to the United States, nor prohibited to the States, are reserved to the states respectively, or to the people. * * * Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the states, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. *The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible states.*" [italics supplied] *Texas v. White*, 7 Wall. 700, 725.

Our government of dual and independent sovereignties involves a delicate balance of powers. Constant repetition has not dulled the sharp significance of the truism that all of the powers of the National Government are dependent upon express delegation by the people, and that the powers of the Federal and State Governments respectively are mutually exclusive.[18] Based as it was upon compromises of political theory

18. No citation of authority is necessary to sustain the proposition that, if the *Wage and Hour Act* can not be sustained under the commerce clause, it is violative of the Tenth Amendment. The power of the National Government over interstate commerce and the powers reserved to the states by the Tenth Amendment are mutually exclusive and, if the exercise of a legislative power lies within the

and upon adjustments of conflicting social and economic interests, the Constitution defies logical analysis. It has been said of the doctrine of constitutional law which uses the appropriate sphere of the states as a measure for, or as a limitation upon, the Federal power over commerce:

> "Logicians may cry aloud at this act of judicial exegesis. The central government has those powers which are granted to it. The states have what is left. Thus it may be argued that it is perfectly clear what is left can not be used to limit what is granted. Actually the judicial process has not been this arithmetical one of minuend, subtrahend and remainder. Rather the process has been one of an effort at wise division between governmental agencies. In such a division the capabilities and needs of both may be and are considered. The division may, of course, develop formulas such as that 'production is not commerce,' but these should not conceal the initial fact of division.
>
> "The arithmetical process will not work because the subtrahend is not a known quantity. The federal power over commerce has no such 'definiteness of contour,' and admits of no such precision of measurement as is required for a problem in subtraction. The division is thus one involving a

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circle of the one, it falls without the orbit of the other. "Such assertions of extra-constitutional authority were anticipated and precluded by the explicit terms of the Tenth Amendment—'the powers not delegated to the United States by the constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people'." *Schechter v. United States*, 295 U. S. 495, 528-529.

practical adjustment, and this necessitates a consideration of the needs of the parties to the adjustment."[19]

Mr. Justice Frankfurter has voiced his recognition of the logical difficulties in the application of the commerce clause to specific cases in thus clearly stating the nature of the judicial problem presented:

> "* * * interstate commerce is a web of state and interstate activities, but not a seamless web. The coexistence of the reserved powers of the states and the commerce power of the nation implies recognition of legal disparateness even where logical unity can be established."[20]

This Court, speaking through the Chief Justice, had occasion recently to reiterate the limitations imposed upon the Federal power over interstate commerce in the area reserved to the state powers:

> "Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 37.

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19. Ribble, *National and State Cooperation Under the Commerce Clause*, 37 Columbia Law Review 43, 47-48.

20. Frankfurter, *The Commerce Clause Under Marshall, Taney and Waite* (1937), 97.

(c) The decisions of this Court establish that manufacture and production are not ordinarily subjects of interstate commerce, and, therefore, generally are not within the regulatory control of Congress.

A general outline of the course of judicial decisions under the commerce clause will be illustrative of the extent of the Federal power. Since any commercial practice affecting in any way interstate commerce usually must have a situs within the territorial limits of some state, litigation under the commerce clause, whether involving an exercise of Federal or state power, has always been concerned with intra-state activities. In each instance, the factors of local and extra-state or national importance have been carefully weighed and a pragmatic determination has been reached which preserves with scrupulous regard the respective state and national interests.

Although the powers of the National and State Governments are clearly separate and distinct under the Constitution, a particular matter may fall within the regulatory powers of both the National and State Governments. On the one hand, the National Government may regulate such matters because of the relation to interstate commerce, and, on the other, a state may regulate in view of the relation to its internal affairs. And it is firmly established constitutional doctrine that, where identical matters are regulated by both the Federal and State Governments, each acting within its constitutional sphere, the exercise of the power of the

former is supreme. Expediency requires that a state must yield to the national policy when a conflict occurs. A recent group of cases illustrates the principle. In *Townsend v. Yeomans*, 301 U. S. 441, the power of the State of Georgia to regulate the rates to be charged by tobacco warehousemen for their services in selling tobacco was sustained. The matter regulated had such relation to the public welfare of the state as to justify its control. Indicative of the Federal power over related activities are the cases of *Currin v. Wallace*, 306 U. S. 1, and *Mulford v. Smith*, 307 U. S. 38. *In solido*, these cases illustrate that matters incidental to the orderly marketing of tobacco may be so closely related to the production of tobacco, on the one hand, as to be susceptible to regulation by the several states, and, on the other hand, the relation to interstate commerce may be so direct as to bring such matters within the power over interstate commerce exercised by the National Government. Of course, the particular matters regulated in the *Townsend*, *Currin* and *Mulford* cases[21] were not identical, but each had as its ultimate aim the orderly marketing of tobacco.

For more than fifty years it was categorically held that manufacturing, mining, agriculture and the like were purely intrastate activities and were subject to

21. *Townsend v. Yeomans*, 301 U. S. 441—regulation of rates charged by tobacco warehousemen under state legislation held constitutional; *Currin v. Wallace*, 306 U. S. 1—compulsory grading of tobacco in warehouses under Federal legislation held constitutional; *Mulford v. Smith*, 307 U. S. 38—quota system with penalty on excess growth under *Agricultural Adjustment Act of 1938*, (52 Stat. 31, U. S. C., Title 7, §§1311, *et seq.*), held constitutional.

the exclusive control of the states under their police powers. A quotation from a decision of this Court expresses admirably the consistent feeling of this tribunal at that time with respect to the proposition stated:

> "Coal mining is not interstate commerce, and the power of Congress does not extend to its regulation as such. In *Hammer v. Dagenhart*, 247 U. S. 251, 272, we said: 'The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped or used in interstate commerce, make their production a part thereof. *Delaware, Lackawanna & Western R. R. Co. v. Yurkonis*, 238 U. S. 439.' Obstruction to coal mining is not a direct obstruction to interstate commerce in coal, although it, of course, may affect it by reducing the amount of coal to be carried in that commerce." *United Mine Workers of America, et al. v. Coronado Coal Co., et al.*, 259 U. S. 344, 407-8.

The doctrine has been most recently reaffirmed in the *Carter Coal Company* case. The Court stated the following in its opinion in that case:

> "That commodities produced or manufactured within a state are intended to be sold or transported outside the State does not render their production or manufacture subject to federal regulation under the commerce clause. * * * One who produces or manufactures a commodity, subsequently sold and shipped by him in interstate commerce, whether such sale and shipment were originally intended or not, has engaged in two

> distinct and separate activities. So far as he produces or manufactures a commodity, his business is purely local. So far as he sells and ships or contracts to sell and ship the commodity to customers in another state, he engages in interstate commerce. In respect of the former, he is subject only to regulation by the state; in respect to the latter, to regulation only by the federal government. *Utah Power & L. Co. v. Pfost*, 286 U. S. 165, 182. *Production is not commerce; but a step in preparation for commerce. Chassaniol v. Greenwood*, 291 U. S. 584, 587." [italics supplied] 298 U. S. 238, 301, 303.

A sale is one of the most customary and usual steps in commercial transactions, and it has uniformly been held that "interstate commerce" comprehends the sale of goods destined for interstate shipment. Thus Congress, under the commerce clause, has the power to regulate sales if they relate to interstate commerce. A statement of the Court demonstrates the rationale of its position:

> "The regulation of commerce applies to the subjects of commerce and not to matters of internal police. Contracts to buy, sell, or exchange goods to be transported among the several States, the transportation and its instrumentalities, and articles bought, sold, or exchanged for the purposes of such transit among the States, or put in the way of transit, may be regulated, but this is because they form part of interstate trade or commerce. The fact that an article is manufac-

> tured for export to another State does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the State and belongs to commerce." *United States v. E. C. Knight Co.*, 156 U. S. 1, 13.

It is not surprising, therefore, in view of these precedents, that the Court sustained the tobacco-inspection and marketing-quota acts in *Currin v. Wallace, supra,* and *Mulford v. Smith, supra,* and the *Agricultural Marketing Agreement Act* in *United States v. Rock Royal Co-operative,* 307 U. S. 533. The conditions and activities regulated were recurrent in the process of sale of tobacco and milk for interstate shipment and did not relate directly to manufacture or production. The Court has always upheld a clear distinction between recurring activities, intimately and directly associated with sales in interstate commerce, and conditions in the actual production of goods for interstate distribution.

It has never been held that Congress may regulate indiscriminately and directly the conditions of production of goods. It would be inaccurate, of course, to contend that all matters involved in the manufacturing and production process are always, and under all circumstances, exempt from Federal control. The *Labor Board* cases, *infra,* show the power of Congress to regulate such matters when their relation to interstate commerce is "close and substantial."[22] But because

22. *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 37.

such conditions generally involve purely intrastate activities which usually fall within the exclusive control of the several states, the extension of Federal control over the intrastate area heretofore has always been cautious and by indirection.

In none of the recent cases, including the *Townsend*, *Currin* and *Mulford* cases, is there any indication, express or implied, that the National Government may directly regulate production. The Court is careful to point this out in the decision in the *Mulford* case:

> "*The statute does not purport to control production.* [italics supplied] It sets no limit upon the acreage which may be planted or produced and imposes no penalty for the planting and producing of tobacco in excess of the marketing quota. It purports to be solely a regulation of interstate commerce, which it reaches and affects at the throat where tobacco enters the stream of commerce,—the marketing warehouse." 307 U. S. 38, 47.

A mere intention to ship in interstate commerce does not necessarily make possible Federal control of the productive process. In this regard this tribunal has said:

> "We may, therefore, disregard the adventitious considerations referred to and their confusion, and by doing so we can estimate the contention made. It is that the products of a State that have, or are destined to have, a market in other States, are subjects of interstate commerce, though they

have not moved from the place of their production or preparation.

"The reach and consequences of the contention repel its acceptance. If the possibility, or, indeed, certainty of exportation of a product or article from a State determines it to be in interstate commerce before the commencement of its movement from the State, it would seem to follow that it is in such commerce from the instant of its growth or production, and in the case of coals, as they lie in the ground. The result would be curious. It would nationalize all industries, it would nationalize and withdraw from state jurisdiction and deliver to federal commercial control the fruits of California and the South, the wheat of the West and its meats, the cotton of the South, the shoes of Massachusetts and the woolen industries of other States, at the very inception of their production or growth, that is, the fruits unpicked, the cotton and wheat ungathered, hides and flesh of cattle yet 'on the hoof,' wool yet unshorn, and coal yet unmined, because they are in varying percentages destined for and surely to be exported to States other than those of their production." *Heisler v. Thomas Colliery Co. et al.*, 260 U. S. 245, 259-260.

The factor of intention gives color to activities normally associated with matters of internal concern only where there is a manifest intent to obstruct interstate commerce, as in *United Mine Workers v. Coronado Company*, where this Court said:

"And so in the case at bar, coal mining is not interstate commerce and obstruction of coal

mining, though it may prevent coal from going into interstate commerce, is not a restraint of that commerce unless the obstruction to mining is intended to restrain commerce in it or has necessarily such a direct, material and substantial effect to restrain it that the intent reasonably must be inferred." 259 U. S. 344, 410-411.

The second *Coronado Company* case reiterates the principle:

> "The mere reduction in the supply of an article to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture or production is ordinarily an indirect and remote obstruction to that commerce. But when the intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering and moving in interstate commerce, or the price of it in interstate markets, their action is a direct violation of the Anti-Trust Act." *Coronado Coal Co. v. United Mine Workers*, 268 U. S. 295, 310.

(d) The legislative findings of fact contained in Section 2(a) of the Act are an attempt to create powers which were not granted or delegated to Congress under the commerce clause of the Constitution.

There can be no quarrel with the assertion that courts should always approach legislative findings of fact with respect. The legislatures are entrusted with the solemn duty of enacting the laws under which we live. Their deliberations and findings are rightfully entitled to the most painstaking analysis before the judiciary

should declare that a law has exceeded the constitutional limits of the powers of the enacting body. But the duty of the courts is equally as important. They interpret the constitutions which are the bulwark of our civilization. No matter how sympathetic a court may be towards legislation under constitutional attack, if it transcends the constitutional power of Congress, it should be struck down, and no matter how repugnant legislation may be to the court, if it is in the constitutional orbit, it should be upheld. The ultimate aim and objective of a certain law may be and often is important; the power constitutionally to enact, however, is always more and all-important.

Regardless of whether Congress chooses to include in any of its enactments a declaration of its findings in justification of the legislation, a presumption of constitutional validity attaches to its acts. *United States v. Carolene Products Company*, 304 U. S. 144, and the other cases cited in the brief of the Government, correctly state the force of the presumption, but appellant seemingly misconceives its proper application.

It is notable that almost without exception the cases giving weight to the presumption have allowed it to affect only the question of the reasonableness of the legislation when attacked for alleged violation of the due-process-of-law requirements of the Constitution. Until recently the presumption had been invoked exclusively in cases involv-

ing state statutes enacted under authority of the police power. 36 Columbia Law Review 283. *United States v. Carolene Products Co., supra,* demonstrates that the presumption likewise applies to Federal legislation. The discussion in the *Carolene Products Co.* case, as in prior cases, relates solely to the bearing of the presumption on the question of the reasonableness of the statute challenged; the question of the power of the Congress over the subject regulated was determined without reference to any presumption. It is clear, therefore, that the presumption is relevant only with respect to the mode of exercise of an admitted or judicially approved power—it is concerned solely with the question whether the statute, in effecting a deprivation of life, liberty, or property, has a rational basis.

Whether regulation of a particular subject lies within the commerce power—whether particular circumstances have a "direct" or "indirect" effect upon interstate commerce—is a matter for judicial determination. The principle is analogous to that involved in the field of administrative law in the determination of "fundamental" or "jurisdictional facts." Cf. *Crowell v. Benson,* 285 U. S. 22. The mere fact that Congress has assumed power to regulate a particular subject does not give rise to any presumption that the power exercised is within those delegated to the National Government.

We respectfully submit that a presumption of constitutionality exists only where the statute has on its

face the imprimatur of constitutionality. Cf. *United States v. Carolene Products Co., supra.* And, in any event, the presumption of a rational basis in support of the legislation can not prevail where there exist facts to the contrary which compel recognition by judicial notice. Cf. *South Carolina Highway Dept. v. Barnwell,* 303 U. S. 177, 191; *Clark v. Paul Gray, Inc.,* 306 U. S. 583, 594.

The inclusion of specific legislative findings can be of no greater force and effect in support of a statute than the presumption of constitutionality, since the presumption, where operative, presupposes the existence of a state of facts in justification of the enactment. The holdings of this Court clearly indicate that such recitals of Congress add nothing to what the Court would otherwise presume.

The legislation under review in each of the cases of *National Labor Relations Board v. Jones & Laughlin Steel Corp.,* 301 U. S. 1, and *Schechter v. United States,* 295 U. S. 495, contains declarations of Congressional findings. It is noteworthy that the opinions in those cases made no reference to the pertinence of those findings to the issues drawn, although the Court reached contrary conclusions in the two cases with respect to the constitutionality of the statutes presented. The issue as to the validity of the acts was determined by an independent judicial consideration of the conditions regulated without reliance upon the

assertions of Congress as to the nature of their effect upon interstate commerce.

In the *Carter Coal* case, Mr. Justice Sutherland had occasion to discuss the appropriate status of such declarations and characterized them as follows:

> "These affirmations—and the further ones that the production and distribution of such coal 'directly affect interstate commerce,' because of which and of the waste of the national coal resources and other circumstances, the regulation is necessary for the protection of such commerce—do not constitute an exertion of the *will* of Congress which is legislation, but a recital of considerations which in the *opinion* of that body existed and justified the expression of its will in the present act." 298 U. S. 238, 290.

Section 2 of the *Fair Labor Standards Act* transcends its proper sphere. It attempts judicial interpretation under the guise of the fact-finding prerogative. The characterization of the relationship of particular facts to interstate commerce is a judicial function; the Congress may not preclude independent judicial investigation and determination by the simple expedient of labelling particular circumstances as "direct" obstructions to interstate commerce. Cf. *Carter v. Carter Coal Co.*, 298 U. S. 238, 290, 307.

Mr. Justice Brandeis stated the controlling considerations, when he wrote, in another context:

> "The legislature must obviously decide, in the

> first instance, whether a danger exists which calls for a particular protective measure. But where a statute is valid only in case certain conditions exist, the enactment of the statute cannot alone establish the facts which are essential to its validity." *Whitney v. California*, 274 U. S. 357, 374.

It is the province of this Court to determine whether the requisite conditions exist to justify the purported exercise of the Congressional power under the commerce clause—whether certain factual situations directly affect interstate commerce. The judiciary is not required to renounce its prerogative in deference to mere assertions by the legislature.

The Government challenges appellee's contention that the declarations of Congress do not raise a presumption of correctness in the determination of the question whether particular matters have a direct or indirect effect upon interstate commerce.[23] The authority relied upon by the Government is contained in a statement by the Court in *Stafford v. Wallace*,[24] repeated in *Chicago Board of Trade v. Olsen*.[25] It is significant that this statement was made with reference to particular states of facts, the effect of which upon interstate commerce was indisputably direct and plainly visible. In its proper sense, the Court's statement is applicable only to the question

23. Brief for the United States, at 41.
24. 258 U. S. 495, 521.
25. 262 U. S. 1, 37.

whether the practices regulated affect interstate commerce and not whether such effect should be characterized as "direct" or "indirect," for purposes of determining the division of state and Federal powers in a particular instance.

The discussion in the *Stafford* case must have reference to the presumption of constitutionality, since the act under judicial scrutiny did not contain any recitals of fact, the background of the act being a matter of common knowledge. The reiteration of the statement in the *Olsen* case, which involved a statute containing declarations of legislative findings, shows that the treatment accorded such declarations is the same as that to be rendered the presumption of constitutionality.

Unquestionably. "commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business."[26] But, as already suggested, complete logical unity of regulation under the commerce clause is not possible in view of the coexistence of the reserved powers of the states and the commerce power of the Federal Government. When the interests of the perpetuation of our dual form of government so demand, recognition of legal disparateness is required.

Appellee sincerely contends that the factual material which has been included in the brief of

26. *Swift & Co. v. United States*, 196 U. S. 375, 398.

the Government is not entitled to any greater weight than the presumption of constitutionality which the Government urges, since the presumption, where operative, presupposes the existence of a state of facts in support of the legislative act. To this Court, the presentation of these factual matters is an oft-told tale. The Government has asserted in all of the recent commerce-clause cases, from the *Schechter* case to the present, that such categories of facts are determinative of the Congressional power. In no case which is controlling in this litigation has the argument of the Government been accepted. See *Schechter Corp. v. United States*, 295 U. S. 495, 548-550; *United States v. Butler*, 297 U. S. 1, 74-75; *Carter v. Carter Coal Company*, 298 U. S. 238, 308-309.

(e) Section 15(a) (1) is an unconstitutional exercise of the power under the commerce clause in attempting to control the evil aimed at in Section 2(a) (1) of the Act.

Appellee does not deny that there is a distinction between the scope of §§15(a) (1) and 15(a) (2) as they relate to interstate commerce. And the validity or invalidity of these two sections purports to rest upon different constitutional grounds. The essence of appellee's argument against the validity of §15(a) (1) is that it does not constitute a permissible regulation of interstate commerce, since it is directed to the attainment of a prohibited end—the regulation of purely intrastate activities, in furtherance of an independent national policy and in absolute defiance of state policy.

Whereas §15(a) (1) attempts to regulate the flow of goods produced without compliance with the statute only after they reach the stream of interstate commerce, §15(a) (2) reaches back and takes command of the production stage itself. It there seeks the direct regulation of the conditions under which goods may be manufactured. However, so far as their coercive effect is concerned, the two provisions are identical. Logically, there is no difference between the power to impose a penalty for shipping goods in interstate commerce which were produced without compliance with specified conditions and the power to impose a penalty for failure to comply with specified conditions before shipment in interstate commerce. In each instance there is imposed a condition upon shipment in interstate commerce which involves the identical form of restraint upon the activities of a producer of commodities for shipment in interstate commerce. We submit that, logically, the same argument is, therefore, applicable against these two provisions of the *Fair Labor Standards Act*. However, since the Government asserts that the validity of the sections rests upon different constitutional grounds, appellee's argument will discuss each of the separate bases of validity urged by the Government.

The Act has first found that a minimum standard of living is necessary for the health, efficiency and general well-being of workers. The next step in the syllogism is the assertion that commerce and the

channels of trade are being used to perpetuate detrimental labor conditions among the workers of the various states. Then §15(a) (1) declares the prohibition. The cycle is complete when the proscribed act is defined as the *production* of goods in which there has been a failure to adhere to the statutory standard of minimum wages and maximum hours. The simplicity of the legislative plan disguises its extreme implications. Suffice it to say that, if it receives the stamp of judicial approval, the states will have been stripped of the power to control their destinies in economic matters, and the Federal Government will have been made supreme in a sense never intended by the Constitution of the United States.

(1) The holding in the Convict Labor case is not controlling in this case.

The genesis of appellant's view of the commerce power of Congress is to be found in the decisions which approved the exercise of a *quasi* police power under the commerce clause, supplemental to state action under authority of the ordinary police power. The states were found, in these particular areas, to be impotent to enforce their laws because of their lack of control of the instrumentalities of interstate commerce. The gap was filled by Federal legislation, and the constitutionality of the implementing statutes was time and time again asserted by this Court.[27] The character of

27. *Champion v. Ames*, 188 U. S. 321—lottery tickets; *United States v. Popper*, 98 Fed. 423—obscene literature; *Rupert v. United States*, 181 Fed. 87—wild game illegally killed; *Hipolite Egg Co. v. United*

the rights curtailed in each of the foregoing cases is significant. In every instance there was either something in the goods themselves, or in an incidental activity, which had been universally condemned as repugnant to health, welfare or morals.

The Government has urged in its brief the unqualified extension of this doctrine to a prohibition of shipments in interstate commerce of goods which are of themselves proper and useful articles of commerce. The case of *Kentucky Whip & Collar Company v. I. C. R. Co.*, 299 U. S. 334, is cited as authority. In this case, the constitutionality of the *Ashurst-Sumners Act*[28] was involved. Under its terms the transmission in interstate commerce of goods made with convict labor into consuming states in violation of their laws was prohibited. The Kentucky concern offered for transportation goods produced with convict labor whose destination lay within a state which had prohibited the sale of convict-made goods within its borders. The carrier refused and a mandatory injunction was sought by the shipper. In a unanimous opinion, this Court upheld the constitutionality of the Act. It is stated by the Government in its brief[29] that, if Congress can close the channels of interstate commerce to goods made with convict labor, it

States, 220 U. S. 45—impure and misbranded foods; *Hoke v. United States*, 227 U. S. 308—women transported for immoral purposes; *Brooks v. United States*, 267 U. S. 432—stolen automobiles; *Gooch v. United States*, 297 U. S. 124—kidnapped persons.

28. 40 Stat. 494, U. S. C., Title 49, §§61, *et seq.*

29. Brief for the United States, at 62.

can do the same with respect to goods produced with low-cost labor. The assertion shows a misconception of the restricted ruling in the *Whip & Collar Company* case. The Court expressly stated:

> "The pertinent point is that where the subject of commerce is one as to which the power of the State may constitutionally be exerted by restriction or prohibition in order to prevent harmful consequences, the Congress may, if it sees fit, put forth its power to regulate interstate commerce *so as to prevent that commerce from being used to impede the carrying out of the State policy.*" [italics supplied] 299 U. S. 334, at page 351.

The *Convict Labor* case is not authority for the proposition that Congress may usurp the exclusive control of the affairs of the several states by an extended use of its power under the commerce clause, but it merely holds that Congress may protect, through this power, states which have enacted legislation that deserves protection.

In its broadest aspect, the *Whip & Collar Company* case imposes a barrier to the constitutionality of the *Wage and Hour Act*. The decision necessarily accepted the argument that economic and legislative experiments in one state may be protected from competition originating in states whose customs and laws differ. This is as it should be. The case portrays the State and Federal Governments operating co-operatively in their proper spheres. It points out the sure and true road

over which social experimentation should travel. It is low-gear, rather than high-gear, legislation. Its precept will preserve for our national economy one of its most valuable attributes—the power of the states to progress by trial and error without imposing on the country at large the burden of inevitable mistakes. It has been aptly put by Mr. Justice Brandeis in his famous dissenting opinion in *New State Ice Co. v. Liebmann*:

> "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." 285 U. S. 262, 311.

(2) A prohibition of shipments in interstate commerce, except under specified conditions, is not necessarily a permissible exercise of the Congressional power.

It is asserted by the Government that the sales, shipments and deliveries prohibited by §15(a) (1), of and in themselves, constitute interstate commerce and that a prohibition of interstate shipment except in compliance with prescribed conditions, being on its face a regulation of interstate commerce falls within the commerce power granted to Congress by Section 8 of Article I of the Constitution. It is, of course, admitted that interstate shipments are interstate commerce, but it is not so clear and undeniable as the Government contends that the prohibition of such transactions, in every event, constitutes a valid regulation of interstate

commerce. *U. S. v. Butler*, 297 U. S. 1, and *Hammer v. Dagenhart*, 247 U. S. 251, satisfactorily demonstrate that the "attainment of a prohibited end may not be accomplished under the pretext of the exertion of powers which are granted."[30]

In support of its thesis the Government treads upon dangerous ground in asserting: "The power of Congress is measured by what it regulates, not by what it affects."[31] It is apparent that this statement is but a half-truth. The "effects" of a particular regulation of commerce upon intrastate and extra-state or national matters are always regarded as of primary importance in disputes as to the proper and constitutional spheres of control of the state and national powers under the commerce clause. The perpetuation of our dual system of government demands such consideration. The case of *Hammer v. Dagenhart*, 247 U. S. 251, is directly in point. An Act of Congress[32] prohibited the transportation in interstate commerce of goods which had been produced with child labor. The Court held the statute unconstitutional as an invasion of the police powers of the states. There, as here, the statute closed the channels of interstate commerce to goods not produced in compliance with prescribed conditions. Insofar as the restriction operated upon shipments, it was an admitted control of interstate commerce. But this Court recognized that the

30. 297 U. S. 1, at 68.
31. Brief for the United States, at 13.
32. Act of September 1, 1916, 39 Stat. 675.

Constitution imposes well-defined boundaries for the exercise of Federal power over commerce among the states. These limitations are not necessarily express or dependent upon a solitary constitutional provision, but may arise by implication and may be the result of a combination of provisions. The line of demarcation was blazed in that case, as it should be here, in order to prevent improper encroachment upon the appropriate sphere of state control.

It is undeniable that *Hammer v. Dagenhart* has been severely criticized. It was burdened both by a brilliant dissenting opinion[33] and by universal condemnation of the underlying evil at which the statute was aimed. But the real basis of the decision, as already pointed out, was that the *Child Labor Act* was repugnant to the Constitution because it subjected state policy to national domination. This rule of itself has never been questioned.

The *Labor Board* cases[34] which are cited by the Government in defense of the *Fair Labor Standards Act*, sustain this principle. "Undoubtedly the scope of this power must be considered in the light of our dual system of government, and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of

33. Justice Holmes at 277 of 247 U. S.
34. *National Labor Relations Board v. Jones & Laughlin*, 301 U. S. 1; *National Labor Relations Board v. Fruehauf Company*, 301 U. S. 49; *National Labor Relations Board v. Friedman-Harry Marks Clothing Company*, 301 U. S. 58.

our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. The question is necessarily one of degree." *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, at page 37. In *Hammer v. Dagenhart*, the Court could not close its eyes to the fact that the Act was purely a regulation of the conditions of production of goods solely in furtherance of a national policy independent, and in defiance, of state policy. The Act would have completely nullified the police power of the states, and if held valid, considerations of degree would have become irrelevant in drawing the line of demarcation between the Federal power over interstate commerce and the police power of the states over internal matters. The "indestructible Union, composed of indestructible States" would have been converted into an omnipotent Union of puppet sovereignties. The *Child Labor Tax Act*, held unconstitutional in *Bailey v. Drexel*, 259 U. S. 20, attempted the same type of regulation, and the policy of the *Fair Labor Standards Act of 1938* attempts to produce the identical result which was abhorred in the *Hammer* and *Bailey* cases.

We respectfully urge that there is no merit in the unqualified proposition urged by the Government that the imposition of conditions upon shipment in interstate commerce is necessarily a regulation of interstate commerce. Clearly, the subjects upon which the conditions react must be examined to determine whether

the purported regulation has the requisite relation to interstate commerce to constitute a valid exercise of the Federal power. The logical conclusion of the Government's argument is that Congress might impose, as a condition of shipment in interstate commerce, that all of the employees of a producer, whether the duties of such employees related in any manner to the production of goods for interstate commerce, be employed and paid in accordance with the standard stipulated. *Reducere ad absurdum*, if the prohibition is to be the sole determining factor in the test of validity, Congress could deny the channels of interstate commerce to commodities produced with labor of a certain creed or color. Aside from considerations of due process, the analogy is exact.

(3) The respective governmental interests of the National Government and of the several states in commerce in useful and harmless commodities differ in character from their respective interests in commerce in harmful and deleterious articles.

It is argued that the power of Congress to restrict or impose conditions upon interstate commerce in useful and harmless articles is coextensive with its power to restrict or condition interstate commerce in articles which are harmful or deleterious. The inference which the Government attempts to draw from the cases cited at page 62 of its brief is not decisive on this score. A clear distinction does exist between the power of Congress to prohibit interstate shipments of harmful and deleterious goods and its power to regulate shipments

of useful commodities. The respective state and national interests involved and the effects on interstate commerce and on matters of local concern within the states are distinct in the two cases. The effect of harmful and deleterious commodities upon both interstate commerce and intrastate matters is plainly visible and indisputable. They react with the same harmful effect upon all interests of both our Federal and State Governments. On the other hand, the effects upon commerce of conditions relating to the production and shipment of useful commodities are not so easily ascertainable, and the respective interests of the several states and the Federal Government are often at variance.

The cases discussed in the first paragraph on page 64 of appellant's brief and at page 31 of appellee's brief, approve the Federal power to prohibit shipments of harmful and deleterious commodities or articles in relation to which there is existent some incidental activity, universally condemned as repugnant to health, welfare or morals. The statutes in each of those cases were sustained not alone because on their face they were regulations of commerce, but, more important, because it was impossible to argue effectively that any powers of the states were adversely affected thereby.

Similarly, the states, themselves, are empowered to prohibit interstate shipments of harmful goods, where shipments of useful articles of commerce could not be

so regulated. It is well settled that a state may prohibit interstate commerce so as to make effective a quarantine against disease.[35] The same power exists to prohibit the shipment in interstate commerce of game illegally killed[36] and unripe citrus fruits.[37] The cases have denied state power to prohibit certain interstate shipments, as, for example, in the decisions involving state efforts to keep at home certain resources, such as natural gas[38] and unshelled shrimp.[39] These holdings make it manifest that the diverse interests of the several states in these useful commodities prevent the exercise of state powers which constrict the free flow of interstate commerce.

The underlying principle of all of the decisions involving prohibitions of shipments in interstate commerce, whether concerned with an exercise of power by the Federal Government or an exercise of power by a state government, seems dependent upon the preservation of a balance between all of the local, extra-state and national interests involved. We respectfully contend that a prohibition of shipments in interstate commerce of harmful commodities does not infringe upon, but is a supplement to, the powers of the other governmental units which might be affected, whereas in the

35. *Rassmussen v. Idaho*, 181 U. S. 198; *Smith v. St. L. & S. W. Rwy. Co.*, 181 U. S 248; *Asbell v. Kansas*, 209 U. S. 251.
36. *Geer v. Connecticut*, 161 U. S. 519.
37. *Sligh v. Kirkwood*, 237 U. S. 52.
38. *Oklahoma v. Kansas Natural Gas Co.*, 221 U. S. 229; *Pennsylvania v. West Virginia*, 262 U. S. 553.
39. *Foster-Fountain Packing Co. v. Haydel*, 278 U. S. 1.

case of useful and harmless commodities the separate interests are diverse and are unequally affected by the individual regulatory efforts of the governments concerned.

(4) The power of Congress is restricted to commerce among the several states, and the validity of an exercise of this power is not primarily determined by its tendency to promote the general welfare.

We agree that the power of Congress over interstate commerce does not differ in extent or character from that retained by the states over intrastate commerce. Congress possesses the same unlimited authority over the former field as do the states over the latter in exercising their respective police powers for the public benefit. However, the delimitation of "the field of interstate commerce" is the crucial matter, since it is only within this sphere that the Congressional power may operate. The Congress does not have any broad general power to legislate for the promotion of the general welfare or for the furtherance of humanitarian ends unrelated to matters of commerce with foreign nations and among the several states. It is not appellee's contention that the *Fair Labor Standards Act* must be held invalid simply because it is concerned with humanitarian ends. Such an objection could no more be supported than the converse, which is the Government's argument. The statute involved in the present case should be held invalid because the preservation of the powers of the states overbalances any national interest which may be involved.

It is axiomatic that the Congressional power extends only to "that commerce which concerns more states than one," including "those internal concerns which affect the states generally," in contrast to "the completely internal commerce of a state,"[40] but this formula does not of its own terms settle the problem of the validity of a particular exercise of power by the Congress. The respect in which intrastate matters "affect the states generally" and in which commerce "concerns more states than one" remains to be determined in individual cases. Mere similarity of commercial problems which are common to all of the states does not mean that Congress may legislate with respect to such problems. Examples of matters of local concern which are of national interest because of their universal recurrence in the various states come easily to mind. One very striking problem will serve to illustrate the point. The concentration of population in urban areas and the increasing use of motor vehicles have created serious traffic problems in all of the states of the Union. Yet it could not be seriously urged that the cumulative effect of these conditions upon commerce among the states and the general prevalence of these conditions throughout the country would render valid uniform regulation of traffic by Congress. Identical considerations are applicable to the present case.

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40. *Gibbons v. Ogden*, 9 Wheat. 1, 194-195.

(5) The necessary effect of Section 15(a) (1) is to regulate directly conditions of production.

It is readily apparent that §15(a) (1), though in terms prohibiting only interstate shipments and sales, is aimed at the regulation of production rather than regulation of commerce. A casual reading of the statute is sufficient on this score. A similar prohibition was denied validity in *Hammer v. Dagenhart*. The characterization of this latter prohibition by the Government's counsel in another case admirably expresses appellee's contention here: "The legislation was cast in the form of commerce regulation to achieve a non-commerce purpose, to impose upon those engaged in production a prescribed labor policy."[41] Irrespective of the motive of Congress in enacting the *Fair Labor Standards Act of 1938*, the infringement upon state powers effected thereby is destructive of our dual system of government and should not be permitted.

The analogy which the Government attempts to draw between the prohibition imposed by the *Wage and Hour Law* and the prohibition involved in *Mulford v. Smith*, is inept. A distinction is readily manifest between the imposition of quotas at interstate markets, the focal points at which there is a centralization of complete control of the interstate flow of commodities, and the imposition of conditions to interstate shipment which carry the coercive effect of an undisguised dictation in

41. Brief for the United States in *Schechter v. United States*, Nos. 854 and 864, October Term, 1934, at 81.

conditions of production. The former operates directly on interstate commerce and indirectly on production, while the latter is an unmistakable and direct regulation of production. Permissible regulation of intrastate activities depends largely upon considerations of degree. Under the *Fair Labor Standards Act*, this criterion has been forgotten and ignored.

An historical distinction may serve to clarify the point. In *Brown v. Maryland*, 12 Wheat. 419, this Court held invalid a direct and undisguised state tax upon wholesalers of foreign articles. In the *License* cases, 5 How. 504, on the other hand, the Court sustained state statutes the effect of which was to impose a similar tax upon retailers of foreign articles. It is clear that the tax in each instance had, in all probability, an identical effect upon foreign commerce, but the statute which operated directly upon foreign commerce at the moment of the entry of the articles into the territorial limits of the states was held invalid, while the statutes which affected commerce in foreign articles indirectly were sustained.

Correspondingly, the Congressional power over interstate commerce is limited to the regulation of intrastate activities which directly affect interstate commerce. "* * * The distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional

system."[42] This distinction "turns, not upon the magnitude of either the cause or the effect, but entirely upon the manner in which the effect has been brought about."[43] Conditions in production like those involved in the case at bar have always been held to affect interstate commerce in an indirect manner and, therefore, their control is subject solely to the reserved powers of the states. The prohibition in §15(a) (1) produces the same result upon interstate commerce as a direct prescription of conditions of production and should be held violative of the Constitution.

The Government has misconstrued the argument of appellee in describing as "the substance of the opposing argument * * * that any regulation of commerce which has a necessary effect upon matters outside the sphere of federal control is invalid."[44] The real basis of appellee's argument rests upon a recognition of the established duality of sovereignties under the Constitution. Under this view, all of the circumstances surrounding the exercise of power over commerce must be examined realistically in each instance. The determination is an individual one and depends largely upon a proper balancing of local and national factors.

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42. *Schechter v. United States*, 295 U. S. 495, 548.
43. *Carter v. Carter Coal Co.*, 298 U. S. 238, 308.
44. Brief for the United States, at 66.

(6) The ruling in Hammer v. Dagenhart is not inconsistent with the distribution of powers provided in the Constitution.

A final word must be said with respect to the discussion of the case of *Hammer v. Dagenhart* in the Government's brief. Appellant's argument urges the mistaken proposition that "since the states are precluded by the commerce clause itself from forbidding interstate shipments of goods produced under substandard labor conditions, the decision created a no-man's land in which neither state nor nation could function," and that "the establishment of such a hiatus in governmental power is plainly contrary both to the letter and spirit of the Constitution."[45] It has already been demonstrated that the states do possess an effective power to forbid interstate shipments. Moreover, as shown by the *Kentucky Whip & Collar* case, cooperating state and national powers have been fully capable of imposing needful restrictions. There is nothing in the Constitution which indicates that there are any legislative powers which belong to, although not expressed in, the grant of powers in Section 8 of Article I of the Constitution. The proposition that every conceivable legislative power is conferred by that section is in direct conflict with the doctrine that the Federal Government is a government of enumerated powers. Moreover, the words of the Tenth Amendment clearly show that there is no necessity for a finding

45. *Id.*, at 69.

that legislative power over every matter of concern to the people of the states and of the nation is lodged in either the State or Federal Governments, individually or collectively, since that provision of the Constitution expressly stipulates that certain powers are reserved to the *people*.[46]

(f) Section 15(a) (2) is an unconstitutional exercise of the power under the commerce clause in attempting to control the evil aimed at in Section 2(a) (1) of the Act.

The Government asserts that §15(a) (2) may be supported on the same ground as §15(a) (1), since it is a provision reasonably designed to effectuate the prohibition against interstate shipments contained in the latter section. By this statement, the Government repudiates its own distinction between a prohibition having the effect upon production which §15(a) (1) unquestionably causes and a direct regulation of the conditions of production, *eo nomine*.[47] The Government attempts to justify the direct regulation effected by §15(a) (2) upon several theories.

46. Cf. *Kansas v. Colorado*, 206 U. S. 46, 89-91.

47. The argument of the Government in support of §15(a) (1) rests largely upon the dissenting opinion of Justice Holmes in *Hammer v. Dagenhart*. Justice Holmes and the minority in that case were willing to admit that even though a bare prohibition of shipments in interstate commerce should be held valid irrespective of its "indirect effects" upon the methods of production in the states, nevertheless Congress can not directly intermeddle with such methods of production. See *Hammer v. Dagenhart*, 247 U. S. 257, 277, 278. The scope of the power urged by appellant extends to indeterminate limits outside the area defined for the exercise of the Federal power over commerce among the states in the most far-reaching utterance of any member of the Supreme Court.

(1) The asserted necessity for uniform regulation of wages and hours can not bring these subjects within the purview of the Federal commerce power.

In the first place, it is argued that effective regulation of interstate commerce demands uniform regulation of intrastate matters. A simple answer to that contention is that administrative expediency can not excuse regulation of intrastate matters where the result is to obscure completely the proper boundaries of national and state power. A comparable argument was urged in the *Schechter* and *Carter Coal* cases. In each instance, the Court rejected the contention and commented at considerable length upon the power of Congress to remove the inharmonious conditions in the various states.[48] *Schechter v. United States*, 295 U. S. 495, 507-508; *Carter v. Carter Coal Co.*, 298 U. S. 238, 292, *et seq.* It is submitted that the effect of the *Wage and Hour Law* is to grant complete domination to the National Government of the internal affairs of the states. If the Act be sustained, state lines will be of interest in the future solely as historical and geographical markers.

48. This contention was described in the oral argument of Frederick H. Wood, Esq., in the *Carter Coal Company* case in the following manner: "This is but the timeworn and threadbare argument that the Federal Government is empowered to legislate as to all matters in which uniformity is deemed desirable in the interest of the general welfare of the nation as a whole, and that in such circumstances the Congress may, under the pretext of the commerce clause, provide for such uniformity. This argument was rejected by this court in *McCulloch v. Maryland*, demolished in *Kansas v. Colorado*, and repudiated in the *Schechter* case." 298 U. S. 238, 246.

A recent utterance of this tribunal is worthy of consideration in this connection:

> "Until recently no suggestion of the existence of any such power in the federal government has been advanced. The expressions of the framers of the constitution, the decisions of this court interpreting that instrument, and the writings of great commentators will be searched in vain for any suggestions that there exists in the clause under discussion or elsewhere in the constitution, the authority whereby every provision and every fair implication from that instrument may be subverted, the independence of the individual States obliterated, and the United States converted into a central government exercising uncontrolled police power in every State of the Union, superseding all local control or regulation of the affairs or concerns of the States." *United States v. Butler*, 297 U. S. 1, 77.

To the very present time this Court has consistently refused to permit inroads by the Federal Government upon the reserved powers of the states under the guise of a regulation of interstate commerce. The *Carter Coal* case, 298 U. S. 238, the *Schechter* case, 295 U. S. 495, and *United States v. Butler*, 297 U. S. 1, indicate the barriers erected to halt invasion by the Federal powers. Although the *Schechter* case involved the regulation of activities *subsequent* to interstate shipment of goods, while the *Fair Labor Standards Act* attempts the regulation of activities *prior* to interstate shipment, the constitutional principles applicable are

the same. The *Carter Coal* case expressly so holds and reviews the relevant authorities. The following language from that decision is significant:

> "The government's contentions in defense of the labor provisions are really disposed of adversely by our decision in the *Schechter* case, *supra*. The only perceptible difference between that case and this is that in the *Schechter* case the federal power was asserted with respect to commodities which had come to rest after their interstate transportation; while here, the case deals with commodities at rest before interstate commerce has begun. *That difference is without significance.* [italics supplied] The federal regulatory power ceases when interstate commercial intercourse ends; and, correlatively, the power does not attach until interstate commercial intercourse begins. There is no basis in law or reason for applying different rules to the two situations. No such distinction can be found in anything said in the *Schechter* case. On the contrary, the situations were recognized as akin." 298 U. S. 238, 309.

> "A reading of the entire opinion makes clear, what we now declare, that the want of power on the part of the federal government is the same whether the wages, hours of service, and working conditions, and the bargaining about them, are related to production before interstate commerce has begun, or to sale and distribution after it has ended." 298 U. S. 238, 310.

(2) The statutes and cases cited by appellant are not controlling upon the circumstances of this case.

The well-established doctrine which permits the regulation of intrastate transactions, which are so commingled with interstate transactions that all must be regulated if the latter are to be effectively controlled, is inapplicable to this litigation. The factual situations before the Court in the cases cited at the top of page 73 of the Government's brief are in nowise comparable to the situation in the industry of which appellee is a part. The factors which were controlling in the *Schechter*, *Carter*, and similar cases more nearly correspond to those here involved.

The statutes and cases referred to on pages 73 and 74 of appellant's brief are clearly distinguishable. We respectfully urge that the validity of the *Meat Inspection Act* (34 Stat. 1260, U. S. C., Title 21, §78) was sustained by reason of the peculiar conditions prevailing in the meat packing industry, and is governed by the considerations applied in *Stafford v. Wallace*, 258 U. S. 495.

The cases relating to the power of the Secretary of Agriculture to inspect and treat defective cattle and relating to the scope of the *Food and Drugs Act* (34 Stat. 768, U. S. C., Title 21, §2), are unaffected by any considerations applicable under the system of dual sovereignties established by the Constitution. The identity of the interests of all of the governmental units

involved with respect to infected commodities has already been discussed. These cases are easily reconcilable with the *Carter* and *Schechter* cases under this analysis.

It is true that Congress is not required to withhold its hand until actual movement in interstate commerce begins. However, Congress may extend its power only to those transactions occurring before the commencement of interstate movement whose relationship to interstate commerce is sufficiently close and substantial to justify Congressional action, under the decisions of this Court. It is contended by the Government that direct regulation of conditions in the production of goods for interstate commerce tends to effectuate and implement the policy of keeping goods manufactured under prohibited conditions out of commerce. The validity of §15(a) (2) is not to be determined alone by its effectiveness for that specific purpose. Manifestly, a requirement that all producers, whether engaged in interstate or intrastate commerce, should comply with the standard prescribed by the statute would be even more effective to accomplish the result desired under the Congressional policy, but the interests of the states and the perpetuation of our dual system of government prevent this character of regulation.

(3) The failure to conform to the statutory standard of minimum wages and maximum hours in manufacturing establishments similar to that of appellee does not affect interstate commerce in such manner as to be subject to the regulatory power of Congress.

Section 2 of the *Wage and Hour Law* recites that the existence of sub-standard labor conditions "burdens commerce and the free flow of goods in commerce," and this is urged as a justification for the imposition of Federal control.

This Court need not be reminded that it has always found otherwise. In the numerous instances in which this contention has been urged, the Court has replied simply that the direct effect on interstate commerce implied in such statement has no existence in fact or in legal contemplation. The approach of the Court has been realistic, and its adjudications clearly indicate the controlling considerations in the determination of the effect on interstate commerce of a particular intrastate matter.

The applicable test has been formulated in terms of *direct* and *indirect* effects on interstate commerce. The *Labor Board* cases, which are urged by the Government in support of the constitutionality of the *Fair Labor Standards Act*, recognize the distinction as delimiting the power of the National Government. The following statement of the Court clearly so indicates:

> "Although activities may be intrastate in character when separately considered, if they have

such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress can not be denied the power to exercise that control. *Schechter Corp. v. United States, supra.* Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. The question is necessarily one of degree." *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 37.

A long and unbroken line of cases establishes that it is the usual rule that the conditions in production of goods for interstate commerce have only an indirect effect upon interstate commerce.[49] Of course, the oft-reiterated conclusion that "production is not commerce" is simply a convenient formula of the Court, but it serves to reflect the division of powers between the states and nation contemplated by the Constitution.

The differences in the terminology of the *National Labor Relations Act* and the *Fair Labor Standards Act* and consideration of the precise holdings in the

49. *Kidd v. Pearson*, 128 U. S. 1; *United States v. E. C. Knight Co., supra; Coronado Company* cases, *supra; Heisler v. Thomas Colliery Company, supra; Oliver Iron Co. v. Lord*, 262 U. S. 172; *Hammer v. Dagenhart, supra.* These decisions were reviewed and approved by the Supreme Court in the *Carter Coal* case. See *Carter v. Carter Coal Co.*, 298 U. S. 238, 299, *et seq.*

Labor Board cases vitiate any convincing argument based upon those cases. The operation of the *Wagner Act* is dependent upon the existence of "unfair practices affecting commerce." In each case the effect on interstate commerce must be shown to support the application of the statute. The *Wage and Hour Law* extends to employees "*engaged in commerce or in the production of goods for commerce,*" thereby assuming that labor relations in all industries producing goods for commerce "affect" commerce in a respect which authorizes Congressional control. The error in such assumption is indicated by the emphasis placed by this Court upon the flexibility of the *Wagner Act* in the *Jones and Laughlin* case, in which it is stated that the statute "purports to reach only what may be deemed to burden or obstruct * * * commerce, and, *thus qualified* it must be construed as contemplating the exercise of control within constitutional bounds," and "whether or not particular action does affect commerce * * * is left by the statute to be determined as individual cases arise." 301 U. S. 1, 31, 32.

The industries involved in the *Labor Board* cases were organized on a nation-wide scale, and the relation of their operations to interstate commerce was the dominant factor in the enterprises. The Court, in sustaining the *National Labor Relations Act* as applied to such industries, placed great emphasis on such character of the establishments and on the complete dependence of the interstate flow of the goods produced

upon peaceful labor conditions in the plants wherein labor conditions were regulated. The language of the Court in this regard is crucial in its application to the *Fair Labor Standards Act of 1938*:

> "Giving full weight to respondent's contention with respect to a break in the complete continuity of the 'stream of commerce' by reason of respondent's manufacturing operations, the fact remains that the stoppage of those operations by industrial strife would have a most serious effect upon interstate commerce. In view of respondent's far-flung activities, it is idle to say that the effect would be indirect or remote. It is obvious that it would be immediate and might be catastrophic. We are asked to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum. Because there may be but indirect and remote effects upon interstate commerce in connection with a host of local enterprises throughout the country, it does not follow that other industrial activities do not have such a close and intimate relation to interstate commerce as to make the presence of industrial strife a matter of the most urgent national concern. When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war? We have often said that interstate

commerce itself is a practical conception. It is equally true that interferences with that commerce must be appraised by a judgment that does not ignore actual experience." 301 U. S. 1, 41.

The later cases construing the *Wagner Act* have involved enterprises of lesser magnitude than Jones & Laughlin Steel Corporation, but the effect on interstate commerce of the industries considered in these cases obviously was quite as "close and substantial." *National Labor Relations Board v. Fainblatt,* 306 U. S. 601, offers the closest analogy to the *Jones & Laughlin* case. The facts showed that there was normally throughout the year a continuous day-by-day flow of shipments of raw materials to Fainblatt's factory from points without the state, and of finished garments from the factory to New York City and other points outside of New Jersey. Immediately preceding a strike of thirty-four of the workers in the tailoring department of the plant, which was found to have been induced by the unfair labor practices of the employer, shipments were about eighty per cent. of those for the corresponding period of the previous year. Following the strike, output decreased by more than one-half, or to thirty-eight per cent. of the shipments for the corresponding period of the previous year. It is apparent that the relation of the factory in this case to interstate commerce was identical to that of the plant in the *Jones & Laughlin* case. There was a continuous flow of goods in interstate commerce through the factory,

and hence control was focalized in the manufacturing plant. The Court centralized its holding on the proven facts.

A factual situation comparable to that existing in the *Fainblatt* case was before the Court in *National Labor Relations Board v. Bradford Dyeing Association*, No. 588, October Term, 1939. As in the former case, the materials processed were moved to and from the processor by their owners through the channels of interstate commerce. The relation of the activities of the processor to interstate commerce was identical with that in the *Fainblatt* case, which decision was held to be controlling upon the question of the jurisdiction of the Board.

The case of *Santa Cruz Fruit Packing Co. v. National Labor Relations Board*, 303 U. S. 453, similarly indicates the significance of the factual situation in determining the applicability of the *Wagner Act*. The concern there regulated derived approximately 37% of its business from interstate and foreign commerce. It was plainly shown, however, that a labor dispute involving warehouse employees had a direct and substantial effect upon interstate shipments of the concern. In this regard, the Court stated in part:

> "The question that must be faced under the Act upon particular facts is whether the unfair labor practices involved have such a close and substantial relation to the freedom of interstate commerce from injurious restraint that these prac-

tices may constitutionally be made the subject of federal cognizance through provisions looking to the peaceful adjustment of labor disputes.

* * * * *

"Such questions can not be escaped by the adoption of any artificial rule.

"The direct relation of the labor practices and the resulting labor dispute in the instant case to interstate commerce and the injurious effect upon that commerce are fully established. * * * The immediacy of the effect of the forbidden discrimination against these warehousemen is strikingly shown by the findings of the Board. When the men found themselves locked out because of their joining the union, they at once formed a picket line and this was maintained with such effectiveness that eventually 'the movement of trucks from warehouse to wharves ceased entirely'." 303 U. S. 453, 467, 468.

The required effect on interstate commerce was shown to bring the business within the purview of the *National Labor Relations Act.* The employees concerned in the *Santa Cruz* case were not manufacturing or production employees, but were engaged in loading and unloading goods for interstate and foreign shipment after processing and manufacture had been completed. Thus, the effect upon interstate commerce of a strike among these workers was clearly direct, since their duties related to interstate and foreign commerce at the point of entry of the commodities produced into the stream of commerce.

The *Consolidated Edison Company* case, 305 U. S. 197, dealt with a concern conducting wholly intrastate operations, but the facts showed that the peaceful and continued operation of the enterprise was indispensable to interstate and foreign commerce. The Court reviewed at great length the findings of the Labor Board and stated:

> "It can not be doubted that these activities, while conducted within the State, are matters of federal concern. In their totality they rise to such a degree of importance that the fact that they involve but a small part of the entire service rendered by the utilities in their extensive business is immaterial in the consideration of the existence of the federal protective power. The effect upon interstate and foreign commerce of an interruption through industrial strife of the service of the petitioning companies was vividly described by the Circuit Court of Appeals in these words: 'Instantly, the terminals and trains of three great interstate railroads would cease to operate; interstate communication by telegraph, telephone, and radio would stop; lights maintained as aids to navigation would go out; and the business of interstate ferries and of foreign steamships, whose docks are lighted and operated by electric energy, would be greatly impeded. Such effects we can not regard as indirect and remote.' 95 F. 2d. 390, 394." 305 U. S. 197, 221.

The effect on interstate and foreign commerce was palpably direct and immediate.

The remaining cases which have sustained regulation by Congress of apparently local activities, which are pertinent to the present issue, involved situations which are akin to that found in the *Jones & Laughlin* case. These cases have upheld regulation of intrastate activities at vital points in the "stream of interstate commerce." The effect of such local activities upon interstate commerce obviously is direct, since there is a centralization of complete control of the interstate flow at such vital points. A breakdown in these compressed areas would result in an immediate demoralization of interstate commerce.[50] This line of cases includes *Chicago Board of Trade v. Olsen*, 262 U. S. 1, *Stafford v. Wallace*, 258 U. S. 495, and similar cases. The *Meat Inspection Act*,[51] to which reference is made by the Government's counsel,[52] and which has already been distinguished from the *Wage and Hour Law*, is comparable to the legislation upheld in *Stafford v. Wallace*, and *Chicago Board of Trade v. Olsen*. We submit that these decisions are inapplicable in support of the *Fair Labor Standards Act* since they were dependent upon and restricted by the attendant facts in each particular case.

50. The point of control in the *Jones v. Laughlin* case was likened to the *heart* of interstate commerce and in the *Mulford* case to its *throat*. "Summarizing these operations, the Labor Board concluded that the works in Pittsburg and Aliquippa 'might be likened to the *heart* of a self-contained, highly integrated body'." Chief Justice Hughes in *Labor Board v. Jones & Laughlin*, 301 U. S. 1, at page 27. "It purports to be solely a regulation of interstate commerce, which it reaches and affects at the *throat* where tobacco enters the stream of commerce—the marketing warehouse." Mr. Justice Roberts in *Mulford v. Smith*, 307 U. S. 38, at page 47.

51. 34 Stat. 1256, U. S. C., Title 21, §§71, *et seq.*

52. Brief for the United States, at 73.

The Government contends that the decision in the *Carter Coal* case, *supra*, has been undermined by the *Labor Board* cases, *supra*, and, therefore, that the *Carter* case has been overruled by implication. This proposition can not be sustained. In the first place, this Court has made express reference to the rule of the *Carter Coal* case in the very decisions which are alleged to have overruled it. See *National Labor Relations Board v. Jones & Laughlin*, 301 U. S. 1, 34-35, 40-41; *Santa Cruz Co. v. National Labor Relations Board*, 303 U. S. 453, 466; cf. *Sunshine Anthracite Coal Co. v. Adkins*, No. 804, October Term, 1939, 84 L. ed. 825, 832. And it is not the policy of the Court as presently constituted to overrule by implication. See, e. g., *West Coast Hotel Co. v. Parrish*, 300 U. S. 379; *Helvering v. Hallock*, 309 U. S. 106. Secondly, the Court has been careful to confine its holdings in these decisions to the particular fact situations presented. The portions of the opinions in the *Jones & Laughlin* and *Santa Cruz* cases, already quoted, and the following excerpt, sustain this proposition:

> "In determining the constitutional bounds of the authority conferred, we have applied the well-settled principle that it is the effect upon interstate or foreign commerce, not the source of the injury, which is the criterion. It is not necessary to repeat what we said upon this point in the review of our decisions in the case of *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, *supra*. And whether or not particular action in

the conduct of intrastate enterprises does affect that commerce in such a close and intimate fashion as to be subject to federal control, is left to be determined as individual cases arise. Id., see, also, *Santa Cruz Packing Co. v. National Labor Relations Board*, 303 U. S. 453, 466, 467." *Edison Co. v. National Labor Relations Board*, 305 U. S. 197, 222.

(4) The failure to conform to the statutory standard of minimum wages and maximum hours in manufacturing establishments similar to that of appellee does not constitute such an unfair method of competition as to be subject to the regulatory power of Congress.

The third finding of the Congress is that the maintenance of sub-standard labor conditions constitutes an unfair method of competition in commerce. This is an attempt to bring the *Wage and Hour Act* within the doctrine of the *Federal Trade Commission* cases[53] (in which unfair marketing practices, with a subsequent diversion of trade fr n fair sellers, were condemned), or within the scope of the decisions[54] which regulated monopolistic practices in interstate trade.

53. *Federal Trade Commission v. Winsted Hosiery Co.*, 258 U. S. 483—false labelling; *Federal Trade Commission v. Algoma Lumber Co.*, 291 U. S. 67—misleading labelling; *Federal Trade Commission v. Keppel*, 291 U. S. 304—gambling sales methods; *Fox Film Corp. v. Federal Trade Commission*, 296 Fed. 353—misleading naming of old motion pictures; *Federal Trade Commission v. Civil Service Training Bureau, Inc.*, 79 F. (2d) 113—misleading name.

54. *Federal Trade Commission v. Western Meat Co.*, 272 U. S. 554—acquisition of shares of competitor; *Arrow-Hart and Hegeman Electric Co. v. Federal Trade Commission*, 291 U. S. 587—holding company to hold shares of two competing corporations; *Northern Securities Company v. United States*, 193 U. S. 197—holding company to hold stock of competing carriers; *International Shoe Co. v. Federal Trade Commission*, 280 U. S. 291—acquisition of shares of competitor.

The doctrine that the production of goods with low-cost labor constitutes a method of "unfair competition" in interstate commerce which is susceptible tc regulation by Congress has no basis in precedent.[55] There is no question of the public being misled. The contrary doctrine would be a dangerous and radical extension of the concept of "unfair competition." The result would be that there would be no permissible competitive advantages by reason of differentials in the cost of ingredients of production. The varying economic conditions in different industries in different localities would be disregarded. Merely to assert such a doctrine proclaims its inherent danger.

Appellant urges that the determination of the precise practices which are to be considered as against public policy is obviously a legislative matter and that, so far as the scope of the commerce power is concerned, the nature of the practice is not material, as long as it does in fact divert the course of interstate trade from one competitor to another. Manifestly, it is for Congress to decide what conditions which directly affect interstate commerce are harmful to that commerce and require regulation. The limits of this power, however, are clearly set forth in the cases which determine the activities or practices affecting commerce which bear a direct or indirect relation to interstate commerce.

The broad proposition formulated by the Government again entirely overlooks considerations of degree.

55. Cf. *Schechter v. United States*, 295 U. S. 495, 531.

The argument that labor practices of the character regulated by the *Fair Labor Standards Act* affect interstate commerce directly and constitute an unfair method of competition in interstate commerce was forcefully presented to the Court in the *Schechter* case and in the *Carter* case. The application of the test of directness reiterated in those cases unequivocally shows that the measure of Congressional power to regulate methods of competition in interstate commerce is contained in the conventional test.

The fact that it is demonstrable that particular practices divert trade from one producer to another is not of itself determinative of the constitutional question of power. The identical argument of the Government was expressly rejected by this Court in the *Schechter* case where it was said in effect that the power of Congress under the commerce clause to regulate practices affecting competition in interstate commerce may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce "among the several states" and the internal concerns of a state.[56] It is clear that it is no part of the authority or duty of the Federal Government to prevent the diversion of business from one producer to another or from one state to another, under the free play of competition, unless the factors responsible for such diversion can

56. See *Schechter v. United States*, 295 U. S. 495, 548-550.

be held directly to affect interstate commerce under the qualifying principles established by the decisions of this Court.

A direct analysis of the contention of the Government as to the legitimate scope of Congressional power will demonstrate that the argument is but an indirect attack upon the dual system of government established by the Constitution. Dissatisfaction with constitutional forms, whether founded or unfounded, should not justify the obliteration of political lines by the device of varying judicial construction. The briefest reflection will suffice to convince that, if the theory is once accepted that the Constitution confers a power of undetermined extent to regulate anything and everything which "affects" interstate commerce through the flux of economic forces, the Constitution will have been amended by statute into a document which would never have been adopted or ratified originally, and the whole theory upon which the Federal system of this nation was founded and upon which it has been maintained will have been abrogated.

The argument based upon economic facts, as held in the *Schechter* case, proves too much. "If the federal government may determine the wages and hours of employees in the internal commerce of a State, because of their relation to cost and prices and their indirect effect upon interstate commerce, it would seem that a similar control might be exerted over other elements of

costs, also affecting prices, such as the number of employees, rents, advertising, methods of doing business, etc. All the processes of production and distribution that enter into cost could likewise be controlled." *Schechter v. United States*, 295 U. S. 495, 549.

The unprecedented theory of Federal power formulated by the Government would solve the problem of the division of governmental powers by rendering the Federal Government dominant in all commercial and economic matters. No such power of complete control over the economic life of the people and of the states lies submerged in the simple grant of power "to regulate commerce among the several states." The obvious answer to the dilemma, if the present division of powers under the Constitution be deemed inadequate to meet the exigencies of the times, has been indicated by the Chief Justice:

> "If the people desire to give Congress the power to regulate industries within the State, and the relations of employers and employees in those industries, they are at liberty to declare their will in the appropriate manner, but it is not for the Court to amend the Constitution by judicial decision." *Carter v. Carter Coal Co.*, 298 U. S. 238, 318.

Still another serious danger to the preservation of the constitutional form of Union lies within the proposition asserted by the Government. The power to control the conditions of production in the manner

attempted by the *Fair Labor Standards Act of 1938* is the power to impose the standard of living of one section of the country upon another, to discriminate against the industries of one section and in favor of those of another, and to equalize economic conditions by eliminating the economic advantages of more fortunate localities. If Congress may eliminate differentials in labor conditions, it may likewise eliminate other economic differentials which affect conditions in interstate commerce. For example, it is perfectly consistent with the Government's theory to urge that Congress, by the simple power exercised by the enactment of the *Wage and Hour Law*, may directly regulate *methods* of production and may equalize competitive conditions by penalizing areas and industries which have the advantage of cheap power. An utterance of this Court is prophetic of the consequences of such a power: "Any movement toward the establishment of rules of production in this vast country, with its many different climates and opportunities, could only be at the sacrifice of the peculiar advantages of a large part of the localities in it, if not of every one of them." *Kidd v. Pearson*, 128 U. S. 1, 21-22. Without exception, the instances of control by Congress of methods of competition which have been sustained by the Court have operated uniformly throughout the length and breadth of the nation and have been unaffected by any considerations of sectional differences. The unfair methods of competition so curbed have been universally

condemned as destructive of the interests of the nation at large. In any event, the effects of activities within this new field of regulation claimed by Congress upon the respective interests of the states and nation are so nebulous and measured with such difficulty that the conventional and orthodox requirement that intrastate activities shall affect interstate commerce in a direct fashion to authorize Congressional regulation must still be held applicable with respect to matters affecting interstate competition.

The cases under the *Federal Trade Commission Act* and under the *Sherman Act*, cited in the Government's brief,[57] are inapplicable to the instant case. Without exception in those decisions the condemned practices tended to *restrict* competition in interstate commerce. It was not conclusive that the forbidden transactions merely diverted trade from one competitor to another, but the important feature was that such practices restricted interstate competition and, thus, there was a tendency to establish monopoly. A quotation from one of the cases cited by the Government demonstrates that the mere characterization of particular commercial practices as unfair is not the sole determining factor in the cases under the *Federal Trade Commission Act*, but that elimination of competition tending to establish monopoly is an additional requisite to the operation of this Act:

> "In a case arising under the Trade Commission Act, the fundamental questions are, whether the

57. Brief for the United States, at 78-79.

methods complained of are 'unfair,' and whether, as in cases under the Sherman Act, they tend to the substantial injury of the public by restricting competition in interstate trade and 'the common liberty to engage therein'." *Federal Trade Commission v. Raladam Co.*, 283 U. S. 643, 647.

As already indicated, the argument here presented by the Government was likewise advanced to justify the promulgation of the codes under the *National Industrial Recovery Act.* In the case of *Schechter Corporation v. United States*, 295 U. S. 495, 531, it was disposed of by the Chief Justice in the following manner:

"The Act does not define 'fair competition.' 'Unfair competition,' as known to the common law, is a limited concept. Primarily, and strictly, it relates to the palming off of one's goods as those of a rival trader. *Goodyear Manufacturing Co. v. Goodyear Rubber Co.*, 128 U. S. 598, 604; *Howe Scale Co. v. Wyckoff, Seamans & Benedict*, 198 U. S. 118, 140; *Hanover Milling Co. v. Metcalf*, 240 U. S. 403, 413. In recent years, its scope has been extended. It has been held to apply to misappropriation as well as misrepresentation, to the selling of another's goods as one's own,—to misappropriation of what equitably belongs to a competitor. *International News Service v. Associated Press*, 248 U. S. 215, 241, 242. Unfairness in competition has been predicated of acts which lie outside the ordinary course of business and are tainted by fraud, or coercion, or conduct otherwise prohibited by law. Id., p. 258. But it is evident

> that in its widest range, 'unfair competition,' as it has been understood in the law, does not reach the objectives of the codes which are authorized by the *National Industrial Recovery Act.*"

And it has been seen that the self-same theory was resurrected[58] only to be ignored by the Court in the *Carter* case. The opinion of Mr. Justice Sutherland indicates that the theory was not worth an extended discussion and this much is illustrative:

> "Much stress is put upon the evils which come from the struggle between employers and employees over the matter of wages, working conditions, the right of collective bargaining, etc., and the resulting strikes, curtailment and irregularity of production and effect on prices; and it is insisted that interstate commerce is *greatly* affected thereby. But, in addition to what has just been said, the conclusive answer is that the evils are all local evils over which the federal government has no legislative control." 298 U. S. 238, 308.

None of the cases cited and discussed by the Government establishes a doctrine of comparable breadth to that asserted by appellant. All of the recent cases decided by this Court which have determined the permissible scope of Congressional regulation of economic factors having a demonstrable effect upon interstate

58. "Fifthly and finally, it is urged that wages may be subjected to federal control in order to put an end to so-called unfair competition among coal producers and among producing States resulting from wage-cutting as translated into price-cutting; because, it is said, the States are powerless to establish uniform or properly related wage scales and hence the Federal Government is empowered to do so." Argument in *Carter v. Carter Coal Co.*, 298 U. S. 238, at 246.

competition may be supported on conventional and orthodox constitutional grounds. They do not reflect any violent shift in constitutional doctrine.

Some reliance has been placed by the Government upon the opinion in *United States v. Rock Royal Co-operative, Inc.*, 307 U. S. 533. This case may be sustained on any one or more of several tenable grounds. The regulation effected by the *Agricultural Marketing Agreement Act of 1937*[59] was the fixing of prices for the purchase of milk "in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce" in milk.[60] Since price regulation, *per se*, is not forbidden to the Federal Government, the only reasonable constitutional objection which could be urged in the *Rock Royal* case was that the regulation "of the price to be paid upon the sale by a dairy farmer who delivers his milk to some country plant,"[61] was outside the scope of the Federal power. The facts of that case sufficiently indicate that the regulated prices in interstate sales, which have always been subject to regulation by Congress, were so commingled with the intrastate sales as to justify a uniform and effective regulation of the entire price structure under the doctrine of *Currin v. Wallace*, 306 U. S. 1. We submit that the conditions controlled in the *Rock Royal* case, in their relationship

59. Act of June 3, 1937, 50 Stat. 246, re-enacting and amending certain provisions of Agricultural Adjustment Act, Act of May 12, 1933, 48 Stat. 31, as amended August 24, 1935, 49 Stat. 750.
60. §8c(1).
61. 307 U. S. 533, at 568.

to interstate commerce, are not comparable to those brought within the scope of the *Fair Labor Standards Act.*

The holding in *Mulford v. Smith*, 307 U. S. 38, does not support the thesis of the Government in the instant case. It was apparent in the *Mulford* case that the activities regulated directly burdened interstate commerce and obstructed the flow of certain commodities in interstate commerce. That decision did not sanction any regulation of interstate competition in the sense asserted here, since there was no indication that any practice which diverted commerce from one class of producers to another by reason of allegedly unfair competitive practices was there regulated.

The statute sustained in *Currin v. Wallace* controlled matters closely related to sales in interstate and foreign commerce. The cases principally relied upon by the Court as analogous and as authority for the validity of that statute involved instances of regulation at points in the stream of interstate commerce where complete control of the flow was centered, such as the *Stafford*,[62] *Olsen*,[63] and *Lemke*[64] cases. The considerations controlling in those cases are not applicable to the factual situation now before the Court.

The *Kentucky Whip & Collar* case, 299 U. S. 334, clearly does not of its own force authorize Congres-

62. 258 U. S. 495.
63. 262 U. S. 1.
64. 258 U. S. 50.

sional regulation of interstate competition in the manner attempted under the *Fair Labor Standards Act*. The protection afforded by that decision related entirely to competition between a producing state and the consuming state. Stating the proposition in another way, the rule of the *Convict Labor* case protected the markets of the state of destination from the ruinous competition of states with lower labor standards and preserved such markets for locally produced commodities. In a correct sense, therefore, the concern of that case was directed to the effect of the competition of interstate commerce on intrastate commerce. It is clear that under the Articles of Confederation, no state had any inviolable right to market its products in another state in violation of the policy of such state of destination. We submit that the authority of that decision is restricted and its holding simply affirms that the power to protect the domestic markets of a consuming state against interstate competition, and to preserve the markets of such state for its own goods, was not lost by the division of power between state and nation under the Constitution.

The crux of the contention of the Government is thus stated in appellant's brief:

> "Even if a state could protect itself against the introduction of goods produced under substandard conditions in other states, it could not thereby safeguard its industries against the loss of their markets in the forty-seven other states of

> the Union. This national market is, of course, vital to the commerce and industry of each state, which have been developed on a nation-wide scale as a result of the prohibition which the commerce clause imposed upon the power of each state to exclude the products of other states from their local markets." Brief for the United States, at 42.

The fact that individual states can not adequately protect the markets which lie outside their borders for the orderly sale of their products does not vest in the National Government an unqualified power to regulate competition in these interstate markets. The pattern for regulatory control permitted by the Constitution does not comprehend a Federal power of such wide scope. The decisions of this Court conclusively show that activities within one state which have an effect upon conditions in other states may be regulated by Congress only when such activities can be said to affect directly commerce among the states.

(5) The failure to conform to the statutory standard of minimum wages and maximum hours in manufacturing establishments similar to that of appellee does not lead to labor disputes which burden and obstruct commerce and the free flow of goods in commerce so as to be subject to the regulatory power of Congress.

The argument of the Government proceeds somewhat along the following lines: The two most common causes of labor disputes which result in an obstruction of interstate commerce are sub-standard wages and hours and the refusal of employers to bargain collec-

tively with the freely chosen representatives of their employees. Legislation aimed at the latter evil has been upheld in the *Labor Board* cases. It follows that the former evil may be likewise regulated.

In reply to this suggestion, it has already been noticed that there is a fundamental distinction in the terminology of the *National Labor Relations Act* and the *Fair Labor Standards Act.*

The theory of the *Wagner Act* is that, since industrial strife in industries closely related to interstate commerce affects and stifles the flow of interstate commerce, Congress may regulate the labor relations between employers and employees in order to prevent the detrimental effect on interstate commerce. Stating it another way, if Congress has the power to control direct obstruction of interstate commerce, it also has the power to remove the causes that give rise to the obstruction.

This argument is inapplicable to the *Wage and Hour Law.* The power of Congress to remove the causes of obstruction must be exercised within constitutional limits. It may be exercised only where the effect upon interstate commerce is close and substantial. In regulating wages and hours of employees in the status of those of appellee, Congress has by legislative fiat cut far back into the area which is traditionally intrastate in character. In thus attempting to reach the alleged causes that bring about the obstruction, Congress has

imposed its will upon spheres of influence over which the states have sole supervisory control.

This has been done without giving the alleged offender any opportunity to show that his activities have no direct or substantial effect upon interstate commerce.

The *National Labor Relations Act* provides for an independent administrative inquiry which determines whether the forbidden labor practice in a particular industry has, in fact, a direct effect upon interstate commerce. The *Wage and Hour Law* makes no such provision. It attempts arbitrarily to blanket all industries under Federal control whenever any portion of the goods produced moves in interstate commerce or "is produced for commerce." It is the extreme in expanding Federal legislation, the acme, the *ultimitas* in the growth of Federal power under the commerce clause. It is a bald, presumptive attempt on the part of Congress to prescribe standards of wages for all industry.

Comparison of the holdings in the various cases wherein this argument of the Government has been asserted discloses that the considerations applicable to an appraisal of the effects of labor relations in productive processes upon interstate commerce are the same as those applied in more conventional contexts.

A contrast between the *Schechter* case and the *Labor Board* cases is illustrative. It was urged by the Govern-

ment in the *Schechter* case that the wage and hour provisions of the *National Industrial Recovery Act* were part of a statutory plan for the prevention of restraints on commerce caused by labor disputes. The Court's clear analysis of the factors controlling in the demarcation of the dividing line between Federal and state powers shows the scrupulous regard of the Court for the diverse interests of the states and nation. The contention of the Government's counsel was accepted in the *Labor Board* cases where an indisputable showing was made that the duties of the affected employees bore a close and substantial connection with interstate commerce. A simple statement of the applicable principle was made by the Court in the *Jones & Laughlin* case in distinguishing the *Schechter* and *Carter* cases: "It is thus apparent that the fact that the employees here concerned were engaged in production is not determinative. The question remains as to the effect upon interstate commerce of the labor practice involved." 301 U. S. 1, 40.

In no case which has been decided by this Court under the *National Labor Relations Act* has it been held that employees whose relationship to interstate commerce and to the internal concerns of the producing state, respectively, was comparable to that of the employees here involved, could be within the protective power of Congress under that Act. On the other hand, the *Schechter* and *Carter* cases have reached a contrary result, under other statutes, with specific refer-

ence to employees occupying the identical status of those now involved. The *Labor Board* cases have already been distinguished, so that further analysis seems unnecessary.

There is no power in the commerce clause, nor anywhere else in the entire Constitution, which permits such absolute centralized paternalism as is effected by the *Fair Labor Standards Act*. The pattern of the Act completely ignores the careful and painstaking distinctions drawn by this tribunal.

(6) The failure to conform to the statutory standard of minimum wages and maximum hours in manufacturing establishments similar to that of appellee does not interfere with the orderly and fair marketing of goods in commerce so as to be subject to the regulatory power of Congress.

The fifth finding of Congress is that the payment of sub-standard rates of wages works an interference with the orderly and fair marketing of goods in commerce. Apparently, the underlying theory here involved is that this finding may bring the Act within the principle of *Mulford v. Smith*, *Currin v. Wallace*, and the *Rock Royal* case. We submit the attempt is futile. In the first place, the *Fair Labor Standards Act* does not regulate interstate markets in any manner comparable to the legislation upheld in those cases. Here the regulation reaches directly the productive process, and there is no restriction in its scope to an indirect operation upon production, as was involved in

each of those decisions. It is admitted, as an abstract proposition, that Congress may control interstate marketing, even though production may be incidentally affected in the exercise of such control, but Congress may not justify a direct regulation of purely intrastate activities in production by merely showing, or asserting, an indirect or incidental relationship between the control and interstate marketing. The character of the relation of the practices regulated to interstate commerce, in the light of their connection also with matters of internal concern to the producing state, is the controlling element. That is to say, the manner in which interstate commerce is affected is determinative. The analysis to be applied is fully demonstrated in the cases already discussed.

There has been only one instance in the judicial history of this country in which the Supreme Court has sustained the regulation of wages and hours on the part of Congress as a constitutional exercise of its power under the commerce clause. That case is *Wilson v. New*, 243 U. S. 332, which upheld the *Adamson Act*. The prescription of rates of wages there extended only to common carriers in interstate commerce, instrumentalities of commerce admittedly subject to far-reaching Federal control. The facts and exigencies underlying the legislation were unique. Europe was at war. The transportation system of the nation was threatened by paralyzing strikes and labor disorders.

The carriers and their employees had refused to settle their differences by arbitration. Stoppage of transportation would have completely disrupted the commerce of the nation. The Court could not ignore the clear and intimate relationship between the matters regulated and the commerce of the nation, though cautiously stating that the exercise of the Congressional regulatory power was valid only by reason of the refusal of the parties to exercise their private power of settlement. The governmental power was expressly held to be secondary. The restraint of the Court is indicated by the following excerpt from the opinion:

> "What was the extent of the power therefore of Congress to regulate considering the scope of regulation which government had the right to exert with reference to interstate commerce carriers when it came to exercise its legislative authority to regulate commerce? is the matter to be decided. That the business of common carriers by rail is in a sense a public business because of the interest of society in the continued operation and rightful conduct of such business and that the public interest begets a public right of regulation to the full extent necessary to secure and protect it, is settled by so many decisions, state and federal, and is illustrated by such a continuous exertion of state and federal legislative power as to leave no room for question on the subject. It is also equally true that as the right to fix by agreement between the carrier and its employees a standard of wages to control their relations is

> primarily private, the establishment and giving effect to such agreed on standard is not subject to be controlled or prevented by public authority." *Wilson v. New*, 243 U. S. 332, 347.

The experience of the nation since the rendition of the decision in *Wilson v. New* has modified the force of the qualifications expressed by the Court in that opinion. The trend of constitutional doctrine makes it apparent that employees occupying the status of the railroad employees involved in the *Wilson* case are subject to the exercise of Congressional power irrespective of any considerations of immediate stalemate in private negotiations. It is not appellee's contention that the commerce clause prohibits Congressional regulation of wages and hours of production employees in every instance, but simply that the required intimacy between the duties of the employees of appellee and interstate commerce does not exist in this case.

In conclusion, an additional statement as to the individual and cumulative effect of §§15(a) (1) and 15(a) (2) may demonstrate the unprecedented scope of the regulation attempted by the *Fair Labor Standards Act.*

The former section, in making it unlawful to sell with knowledge that shipment or delivery or sale in interstate commerce is intended, denies to a producer who has produced commodities with a view to marketing them within the producing state the opportunity

to make a fortuitous sale to another who contemplates transporting, or selling, such commodities for transportation, across state lines, even though the producer, in not anticipating such sale or shipment in interstate commerce at the time of production, could not be held liable for the violation of §15(a) (2). In addition, criminal liability for sale or shipment in interstate commerce by the purchaser under these circumstances is imposed upon such purchaser. That the effect upon interstate commerce of the standard of wages and hours prevailing among the employees of a producer in this situation is remote, is manifest. The degree of remoteness is further increased in the application of the Act to the production of "any part or ingredient" of goods produced and sold in the manner stated.

Under the view of the Administrator of the Wage and Hour Division, §15(a) (2) may be applicable even though actual movement in interstate commerce of the goods produced does not occur. The Administrator has stated:

> "Employees are engaged in the production of goods *for* commerce where the employer *intends* or *hopes* or *has reason to believe* that the goods or any unsegregated part of them will move in interstate commerce. * * * The facts at the time that the goods are being produced determine whether an employee is engaged in the production of goods for commerce and not any subsequent act of his employer or of some third party. Of course, the fact that the goods do move in interstate com-

merce is strong evidence that the employer intended, hoped, or had reason to believe that the goods would move in interstate commerce." [italics supplied] *Wage and Hour Interpretative Bulletin No. 5*, December 2, 1938.

Nothing can be plainer from the words of the Act, bolstered and supported by the interpretation of the Administrator, that §15(a) (2) thus constitutes solely a direct and barefaced regulation of conditions of employment, without authority under the Constitution. It has always been held that the power of the Federal Government can only be exerted because of movement at some time in interstate commerce. Under the *Wage and Hour Law*, this is no longer the test. The methods and conditions of production provide the test under this law. The method of acquiring the purported power has been forgotten in the zeal of its exercise.

Though in many instances a producer may be subject to both of these provisions of the *Wage and Hour Law*, it is seen that in numerous other instances a producer may be coerced by only one or the other of such provisions. Markets in other states are closed to him when he fails at the commencement of production to anticipate the demand in those markets. On the other hand, he may be subject to penalties provided for violation of §15(a) (2) even though the goods produced by him never in fact enter interstate commerce. In any event, the coercive effect of §§15(a) (1) and 15(a) (2) is identical in that they effectively require

all producers, by reason of the possibility that their products may find a market in other states or that their products may eventually move in interstate commerce even as an ingredient of other articles, to conform with the standard prescribed by the *Fair Labor Standards Act* in order to insure the marketability of their goods. Thus operating upon matters which only remotely concern interstate commerce, both of these sections are directed to the attainment of an unconstitutional objective and should be held invalid.

II.

The Fair Labor Standards Act of 1938 is an unconstitutional attempt to deprive appellee of his liberty and property without due process of law in violation of the Fifth Amendment of the Constitution of the United States.

(a) Introduction.

Appellee asserted in the District Court that the *Wage and Hour Law* is violative of the Fifth Amendment in depriving him of liberty and property without due process of law. The Court found it unnecessary to express an opinion as to the validity of that objection since he found that the Act contravened the commerce clause in its application to defendant. Since the submission of that objection to this Honorable Court will operate to support the judgment of the District Judge, the question of the constitutionality of the Act in the light of the requirements of the Fifth Amendment is properly presented in this appeal. Appellant takes the same view and cites the controlling authori-

ties at pages 99-100 of its brief. Appellee unqualifiedly concurs in the statement of appellant as to the propriety of the consideration of the due process questions by this Court on the appeal in this case.

An impetus has been given to the growth of mimimum wage legislation by the decision of this Court in *West Coast Hotel Company v. Parrish*, 300 U. S. 379. A statute of the State of Washington was there involved. Under its terms the employment of women and minors at less than the wage established by an administrative body was prohibited. A suit was brought by a chambermaid in a hotel to recover the difference between the wages paid her and the minimum wage fixed pursuant to the state law. The Supreme Court of Washington upheld the statute[65] and on appeal its decision was affirmed by this Court.

This tribunal regarded the rule of *Adkins v. Children's Hospital*, 261 U. S. 525, as outmoded and untenable, and expressly overruled that case. The distinction which had been established in prior decisions,[66] and which was observed in the *Adkins* case, between legislation affecting minimum wages and that dealing with maximum hours, was repudiated. The Government contends that the principle sustained in the *Parrish* case is broad enough to embrace the *Wage and Hour Act*. Appellee believes that the *Parrish* case is distinguishable and maintains that the *Fair Labor*

65. *Parrish v. West Coast Hotel Co.*, 185 Wash. 581, 55 P. (2d) 1083.
66. Cf. *Bunting v. Oregon*, 243 U. S. 426.

Standards Act is violative of the due process clause of the Fifth Amendment of the Federal Constitution.

(b) The Wage and Hour Act is a deprivation of the freedom of contract guaranteed to appellee by the Fifth Amendment and is, therefore, violative of the due process clause.

It is firmly established that the due process clause of the Fifth Amendment is a limitation upon all of the powers conferred by the people upon the Federal Government, including the power granted by the commerce clause. See *Currin v. Wallace*, 306 U. S. 1, 14, and cases cited therein.

In asserting that the *Wage and Hour Law* is violative of the liberty guaranteed by the Fifth Amendment, appellee does not contend that the privilege of the individual to contract is an absolute and unqualified right. Manifestly, there are many restrictions which must be imposed to safeguard the interests of the community. These exceptions have been carefully noted by this Court in the decisions,[67] but there remains a prohibition against any arbitrary deprivation of the usual and customary freedom to contract. That freedom remains one of the most valued rights of a nation of free men.

67. Illustrative of the restrictive power are the cases of *Holden v. Hardy*, 169 U. S. 366—limiting working hours in mines; *Knoxville Iron Co. v. Harbison*, 183 U. S. 13—making mandatory redemption of store orders in cash; *Patterson v. Bark Eudora*, 190 U. S. 169—prohibiting payment of seamen's wages in advance; *Bunting v. Oregon*, *supra*—limiting hours of work in manufacturing establishments.

It is imperative to recognize the distinction between the type of legislation upheld in the *Parrish* case and that involved in the case at bar. The Washington statute involved a minimum wage for women and minors. Adult men did not come within its scope. Contrastingly, the *Fair Labor Standards Act* is a bold and unparalleled piece of legislation of the most sweeping and drastic character. The regimentation effected has been all pervasive and all inclusive, and liberty of contract has been utterly ignored.

It is significant that no statute has yet received judicial sanction by this Court which involved the establishment of minimum wages for men with the exception of *Wilson v. New, supra.* Chief Justice Hughes expressly recognized in his decision in the *Parrish* case the peculiar relationship of women to industry. He pointed out:

> "What can be closer to the public interest than the health of women and their protection from unscrupulous and overreaching employers? And if the protection of women is a legitimate end of the exercise of state power, how can it be said that the requirement of the payment of a minimum wage fairly fixed in order to meet the very necessities of existence is not an admissible means to that end? The legislature of the State was clearly entitled to consider the situation of women in employment, the fact that they are in the class receiving the least pay, that their bargaining power is relatively weak, and that they are the

ready victims of those who would take advantage of their necessitous circumstances." 300 U. S. 379, at page 398.

This same distinction is brought to the fore in the opinion of the Court in *Morehead v. New York ex rel. Tipaldo*, 298 U. S. 587, 629:

> "When there are conditions which specially touch the health and well-being of women, the State may exert its power in a reasonable manner for their protection, whether or not a similar regulation is, *or could be*, applied to men. The distinctive nature and function of women—their particular relation to the social welfare—has put them in a separate class. This separation and corresponding distinctions in legislation is one of the outstanding traditions of legal history." [italics supplied]

Care has been taken by the legislatures to recognize the inherent distinction between the bargaining power of men and women. Moreover, the veto power of the Executive has been used to prevent the enactment of blanket legislation, and it is safe to assume that the veto came about because of a feeling that constitutional power was lacking.[68] There is no such feeling of

68. "The New York legislature passed two minimum wage measures and contemporaneously submitted them to the Governor. One was approved; it is the Act now before us. The other was vetoed and did not become law. They contained the same definitions of oppressive wage and fair wage and in general provided the same machinery and procedure culminating in fixing minimum wages by directory orders. The one vetoed was for an emergency; it extended to men as well as to women employees; it did not provide for the enforcement of wages by mandatory orders." Mr. Justice Butler in *Morehead v. New York ex rel. Tipaldo*, 298 U. S. 587, at page 615.

restraint in the *Wage and Hour Act.* With minor exceptions, it is aimed at all industry and at all employees. The categories of permissible subjects of regulation have been ignored. It is impossible to imagine a statute with less regard for precedent or tradition. Its consideration provides a timely and opportune point at which the encroachment of the Federal Government should be stayed. The deductions which have been drawn from the *Parrish* case should be halted, and the permissible scope of regulation should be carefully analyzed. The implications of that decision must be confined within safe boundaries. Sound government demands that the doctrine there enunciated should not be broadened to a limitless area. Appellee believes that the freedom of contract guaranteed to him by the Constitution comprehends, between his employees and himself, the inherent and unqualified right to bargain as to wages and hours.

(c) The Wage and Hour Act is violative of the due process clause because it is arbitrary and capricious.

It is of vital importance to notice that the Washington law sustained in the *Parrish* case was flexible and elastic in its operation. Adequate administrative machinery was established for its adaptation to varying conditions in each and every industry. The legislature was realistic, and it recognized the necessity for the establishment of different standards which should vary as the needs and ability of the various industries to pay was demonstrated. An administrative body, the

Industrial Welfare Committee, was required first to ascertain the wages and conditions of labor of women and minors throughout the state. Public hearings were to be held. The Committee was then given power to call a conference of representatives of employers and employees, together with disinterested parties representing the public, if it should find that a certain trade or industry was paying wages which were inadequate to supply the workers with wages that would enable them to live. The conference was then to recommend to the Committee an estimate of an adequate minimum wage. When the recommendation was approved, the Committee was empowered to establish an obligatory order which would fix the minimum wages. Any such order that was passed was subject to revision with the aid of a new conference. Every detail of the legislation, and every step before the enactment of an obligatory order, shows clearly the care and caution inherent in the Act.

The *Wage and Hour Law* is in direct contrast to the reasonable and flexible provisions of the Washington Act. It has imposed a rigid and inflexible standard for all industry. It has necessarily ignored the requirement implicit in every statutory regulation of prices that the amount to be paid, and the article or service to be procured, shall bear to each other some relation of just equivalence. Adherence to this fundamental precept was implicit in the pattern and mode of oper-

ation of the Washington statute. A reference of the Court to this feature of the law is instructive:

> "The minimum wage to be paid under the Washington statute is fixed after full consideration by representatives of employers, employees and the public. It may be assumed that the minimum wage is fixed in consideration of the services that are performed in the particular occupations under normal conditions. Provision is made for special licenses at less wages in the case of women who are incapable of full service." 300 U. S. 379, at page 396.

The *Fair Labor Standards Act* can not be given the benefit of such an assumption. It is self-evident that the blanket, rigid and inflexible standard established by this legislation can have no relation of equivalence to the value of individual services performed in all enterprises. This is undeniable because, prior to its enactment, there was no investigation of its effect on individual enterprises. This inherent weakness in the original bill was discussed in the conferences of the House Committee on Labor. A sharp conflict of views as to its validity was developed. A minority report written by Honorable Robert Ramspeck, ranking Democratic member of the Committee, is most enlightening in its discussion of the constitutional necessity for flexibility. The very authors of the Act were dubious of its effect throughout the nation. Their fears, in the light of experience, were not unjustified.[69]

69. Because of its importance and clarity we are including in its entirety the statement of the separate views of Mr. Ramspeck on this feature of the bill. The minority report reads as follows:

The Court unquestionably will take judicial notice of local and occupational problems that are inherent in each and every individual industry. The range in the rates of wages which were being paid prior to the effective date of the *Wage and Hour Law* is an obvious recognition of this inconsistency in the economic life of this country. It is not reasonable to assume that all employers who pay high wages are for that reason generous and far-sighted, while those who pay lower wages are unfeeling oppressors of labor. Instances of

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"In the opinion of the undersigned, the bill being reported by the majority of the Committee on Labor of the House as a substitute for the bill passed by the Senate is not a reasonable exertion of governmental authority, but, on the contrary, is arbitrary and discriminatory. It is our opinion that it violates the due-process clause of the Constitution, and therefore will be held invalid when it reaches the Supreme Court if it should be enacted into law.

"The history of minimum-wage legislation is as follows: In 1923 the Supreme Court held invalid in the *Adkins case* the District of Columbia statute providing for regulation of minimum wages through wage boards. Later the State of Arizona passed a minimum wage law in a different form. Instead of creating a board to set wages the statute fixed a uniform minimum of $16 per week. In a memorandum opinion this statute was held invalid, and likewise a statute from Arkansas similarly drafted was held invalid a year later. The Arizona case is reported in 269 U. S. 430, and the Arkansas in 278 U. S. 657.

"Last year in the case of *Parrish v. West Coast Hotel Company*, (300 U. S. 379), the Supreme Court, by a 5 to 4 decision, reversed its previous holding in the *Adkins case* and specifically overruled that case. It is significant to note that the Court failed to specifically overrule its previous decisions in the Arizona and Arkansas cases.

"There is only one other Supreme Court decision in the history of this type of legislation. It is the case of *Morehead v. New York* (298 U. S. 587). In that decision the Supreme Court held invalid a minimum-wage law for women in the State of New York. Chief Justice Hughes wrote a dissenting opinion which was concurred in by Justices Brandeis, Stone, and Cardozo. This opinion upheld the statute because the minimum wages were to be based upon two standards, one of which was the reasonable value of services performed.

"It seems that this minority opinion in the *New York case* is now of the utmost importance since the reasoning contained therein was in part used to sustain the Washington State statute in the *Parrish case*.

"It must be remembered that the Supreme Court has never yet conceded plenary power to Congress or to State legislatures to fix

employers who exist by the sweat of the labor of their employees are happily isolated. The true reason for the discrepancy in wages is either that particular industries are incapable of bearing wages comparable to the higher level in the more prosperous units of the industrial sphere or that the quality of the labor does not warrant the higher wage scale. Due process requires that recognition be given to the relative economic ability of employers to pay particular rates of wages, and the validity of legislation which fixes wages

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prices or wages. The exercise of such power has been upheld in only two cases, one of which—the *Parrish case*—has already been discussed.

"In the other case, which is *Nebbia v. New York* (291 U. S. 502), the Supreme Court upheld the statute permitting price-fixing with regard to milk, but in this case and in the *Parrish case*, the power to fix prices and wages was delegated to fact-finding agencies, and these agencies were directed to establish varying prices and wages in accordance with standards incorporated in the laws. The Court pointed out that such statutes must be reasonable and not arbitrary or capricious, and that the right to infringe upon liberty of contract must be justified by considerations of health, the preservation of life, and the protection of a business essential to the public.

"It may be contended that the bill reported by the majority of the committee provides for uniform wage and for uniform hours and is therefore not discriminatory, but when these figures are translated into actual wages in the terms of what the dollars will buy, it will be found that the proposal does not provide uniformity in that respect.

"In the *Washington State case*, Chief Justice Hughes based his decision largely upon the theory that a workman should at least receive the bare cost of living, and pointed out that if this was not the case, the taxpayers were called upon to pay the difference.

"The foregoing is a discussion of the legal questions growing out of the due-process aspect, but we must also keep in mind the fact that before the Federal Government can regulate wages and hours the interstate-commerce clause comes into play.

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"The bill reported by the majority provides for no fact-finding procedure and totally ignores the fact that in a country as large as the United States there are thousands of varying conditions to which this inflexible proposal must be applied.

"For instance, the Bureau of Labor Statistics reports that in towns and villages of a population of 5,500 and less, an average monthly rental of $11 is paid by those in the income group of less than

is dependent upon a recognition of this factor. Due process likewise demands the establishment of proper classifications and a different treatment to the various classifications, where uniformity of status is completely lacking. Due process is not satisfied with a mere imposition of a rigid and unyielding standard that does not heed the possible results in industries that are incapable of compliance.

$1,000. This monthly rental shows a gradual increase as the size of the community increases, and averages $23 per month in cities having a population of more than 1,000,000. It will be seen therefore that although this proposal would prescribe the same minimum wage in the city of less than 5,500 population as it does for the city of more than a million, the worker in the latter city would necessarily pay more than twice as much rent per month as the worker in the small community, and therefore his real wages would be less.

"Another illustration of the complexities to be faced by an inflexible statute can be had from a comparison of rents in Columbia, S. C., and Gastonia, N. C. In Columbia, the worker making from $500 to $1,000 per year will pay $12.60 per month rent, while in Gastonia a worker with the same income will pay only $7.40 per month. The worker in Gastonia will therefore get in actual wages an advantage of $5.20 per month over his brother worker in Columbia.

"We must also consider, from the standpoint of the employer upon whom this burden is to be imposed, the cost of transportation. He must secure raw materials and his finished product must go to the market.

"Fifty-one percent of the population of our country lives in what is known as eastern or official territory with regard to freight rates. Using this territory as the base for 100 the following are the average freight rates for the other sections of the country: Southern, 139; western trunk line, 147; mountain Pacific, 171; and southwestern, 175.

"To impose a rigid inflexible wage in all parts of the United States will unquestionably mean that some employers cannot longer compete in the eastern market where a majority of our consumers reside. That means, therefore, retirement from business, and their employees instead of having their wages raised, will find themselves on relief.

"It seems to the undersigned, therefore, that to approach a solution of this problem, we must have a fact-finding process to which Congress must delegate the power to determine what wages and what hours shall be applied after a thorough consideration of the facts. To do otherwise, would be arbitrary and capricious, would be discriminatory, and would violate the due-process requirements of our Constitution." *House Report* No. 2182, 75th Cong., 3d Sess., pp. 20, *et seq.*

(d) The Wage and Hour Act is violative of the due process clause by reason of its indefiniteness in defining the persons subject to its penal provisions.

It is one of the most fundamental precepts of criminal law that a penal statute should be definite and certain. It should define its orbit with exactitude so that a citizen may be aware of the penalties attendant upon a certain course of conduct. This is as it should be. Liberty is a precious attribute of civilization, and a criminal statute is the most extreme example of restraint that a government knows. Arrest, indictment, fine and imprisonment are harsh deterrents, so that prohibited acts should be defined with such care that only the foolhardy or vicious will be penalized. The standard has been thus defined:

> "The legislature, in the exercise of its power to declare what shall constitute a crime or punishable offense, must inform the citizen with reasonable precision what acts it intends to prohibit, so that he may have a certain understandable rule of conduct and know what acts it is his duty to avoid." 14 *Am. Jur.* 773, §19.

The *Wage and Hour Act* defines with certainty the prescribed standard of conduct, but it differs radically from the usual criminal statute in that it completely fails to indicate the persons who are subject to its terms. The effect of such a plan is to declare unlawful a class of acts which it defines, in essence, not by their intrinsic nature, but by their indirect, contingent and unascertainable results. Within the framework of the

statute the naval stores operator may work side by side with the sawmill operator and may with impunity work a thousand hands at a wage that suits his convenience.[70] But the defendant, Darby, must gamble upon his chances of mastering the meaning of the rather rarefied concepts of "stream of interstate commerce" and "production for interstate commerce." This Court has had occasion to discuss the seriousness of this character of indefiniteness found in a state statute. See *Smith v. Cahoon*, 283 U. S. 553, 562-566. A Florida act attempted regulation beyond the scope of the powers of the legislature, and the act was held invalid because it failed to define the precise limits of the class over which it could exercise control constitutionally. The Court held: "The legislature could not thus impose upon laymen, at the peril of criminal prosecution, the duty of severing the statutory provisions and of thus resolving important constitutional questions with respect to the scope of a field of regulation as to which even courts are not yet in accord." 283 U. S. 553, at 564.

Congress itself was not unmindful of this defect in the *Fair Labor Standards Act*. Section 6 of the original bill which passed the House of Representatives provided for due notice and hearings to determine the relation of various industries to commerce. The Secretary of Labor was then empowered to establish the statutory wages in industries where there was a find-

70. §13(a) (6). See also §3(f).

ing (a) *that the activities of such industries were nation-wide in their scope*, or (b) *that such industries were dependent for their existence upon substantial purchases or sales of goods in commerce and upon transportation in commerce*, or (c) *that the relation of such industries to commerce was in other respects close and substantial.*

The reasons for this statutory scheme are clearly given in the report of the Committee on Labor:

> "Section 6 of the committee amendment directs the Secretary, as soon as practicable after the enactment of the act, to determine the relation of the various industries to commerce. The Secretary is to give due notice to interested persons and an opportunity to be heard. If in the case of any industry the Secretary finds that the activities of the industry are nation-wide in their scope, or that the industry is dependent for its existence upon substantial purchases or sales of goods in commerce and upon transportation in commerce, or that the relation of the industry to commerce is in other respects close and substantial, the Secretary is required to issue an order declaring the industry to be an industry affecting commerce.
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> "Whether the activities of a particular industry are such as to bring that industry within the regulatory power of Congress depends upon facts and is necessarily a question of degree in each case. Hence, it is necessary to have someone determine those facts. Two courses were open to the committee. The committee could have provided

that the facts in each particular case be determined by the trial court in a criminal prosecution for violation of the act, or it could have confided the determination of these facts in the first instance to an administrative officer and provided for court review of the order declaring the facts found to exist. *Had the first course been adopted, the bill would necessarily have been so indefinite that no employer would know whether or not he was subject to the act,* and then, too, each criminal prosecution for violation of the act would have been prolonged indefinitely, inasmuch as the great bulk of the testimony would be directed to the relation of the industry, in which the employer concerned was engaged, to interstate commerce. Hence, the second course was adopted. Inasmuch as there are provisions for court review of the order of the Secretary finding a particular industry to be one affecting commerce, the validity of such an order may be questioned only in such review proceedings, and may not be questioned collaterally in a criminal proceeding involving a violation of the act, although, of course, the effect, under the Constitution, of the order and of the Secretary's finding can always be questioned in any proceeding.

"Once the Secretary issues an order under section 6 with respect to a particular industry, the Secretary has discharged his functions under the act, and thereafter the wage-and-hour provisions operate automatically on all employers in the industry who are engaged in commerce." [italics supplied] *House Report* No. 2182, 75th Cong., 3d Sess., pp. 9, 11.

But the House bill was not adopted. Its pace was too slow. Utopia must be made by the dead line. It is impossible to make any deduction other than that the very uncertainty of the legislation has been of inestimable value in coercing individuals to obey its mandate when, in reality, it could not constitutionally be drafted to include them.

The expressions used in the original House bill to indicate the persons subject to the statute were no less definite than the corresponding provisions of the conference bill which was enacted into law. The definitions in §3 do not sufficiently clarify the scope of the Act.

It is idle to draw an analogy between the *Fair Labor Standards Act* and the *National Labor Relations Act*. In the latter Act, the problem is obviated by administrative machinery to determine the relationship of particular enterprises to interstate commerce. It is in line with the plan contemplated in the original House bill. But under the *Wage and Hour Law* an individual is acquainted with his relationship to interstate commerce by the indictment at the hands of a grand jury. So it has been, in the instant case, with the defendant, Darby.

III.

Conclusion.

Careful analysis of all the authorities compels the conclusion that no decision has yet been rendered by this Court which, either of its own force, or by analogy,

is sufficient to sustain the *Fair Labor Standards Act of 1938*. The Act reaches far beyond any regulation by Congress that has received judicial sanction. The tradition and value of our constitutional form of government require that it be held invalid.

The doctrine of *Hammer v. Dagenhart*, as exemplified in subsequent decisions down to the immediate present, is a proper and efficient safeguard to the permanence of our constitutional structure. It is, and has been, admitted that emotionalism has undermined some of the *dicta* in that decision but its basic principle has not been, and can not be, questioned—that principle is that the Federal Government may not, under color of the commerce clause, subject the states to complete domination in matters of internal policy. It is possible both to abhor child labor and to approve *Hammer v. Dagenhart*, with no sacrifice of consistency.

This Court has ever been careful to restrict Federal control to matters which bear a close, substantial relationship to interstate commerce. Without exception any control over intrastate activities has been permitted only when the effect was incidental and secondary. To preserve this line of demarcation—which is a real and vital one—is of paramount importance to the preservation of our dual form of government. In attempting to obliterate the distinction between local and national spheres of power, the *Fair Labor Standards Act* breaks through and smashes the

proper confines of Federal power which the Court has so carefully and painstakingly blazed.

The ideal example of the State and National Governments working in unison towards the same definite social goal is found in *Kentucky Whip & Collar Co. v. I. C. R. Co.*. The police power of the competing states was there preserved in its full vitality. There is no example of a restless grasp for non-existent power. It shows the Federal Government as supplementing and encouraging the social legislation of a state. Far from constituting authority for the extension of Federal power, it preserves it within its proper sphere. The result will be to preserve the states as invaluable laboratories for their wise—as well as for their misguided—attempts to better the social life of their citizens. The *Wage and Hour Law* would have been comparable if it had forbade the transportation in interstate commerce of goods where the state of origin had produced at lower labor costs than prevailed in the state of destination. But this has not been done: The Act has placed the industry of the nation under a rigid, inflexible, single standard. Once recognition of the power claimed is granted, the floodgates are opened. Subsequent legislation may entail more inequalities and discriminations than are inherent in a minimum wage statute. An utterance of this body is prophetic:

> "Every journey to a forbidden end begins with the first step; and the danger of such a step by

> the federal government in the direction of taking over the powers of the states is that the end of the journey may find the states so despoiled of their powers, or—what may amount to the same thing—so relieved of the responsibilities which possession of the powers necessarily enjoins, as to reduce them to little more than geographical subdivisions of the national domain. It is safe to say that if, when the constitution was under consideration, it had been thought that any such danger lurked behind its plain words, it would never have been ratified." *Carter v. Carter Coal Co.*, 298 U. S. 238, 295.

If Congress had the power under the commerce clause to enact this legislation, if that were conceded for the purpose of considering the other constitutional objections to the Act, nevertheless, the mode of exercising the power violates the Fifth Amendment. The statute is so indefinite that it fails absolutely to inform appellee as to whether or not his business activities are within its scope. Indefiniteness in this respect is just as fatal as in the ordinary criminal statute. Cf. *United States v. Cohen Grocery Company*, 255 U. S. 81.

Furthermore, in establishing a standard of conduct the *Wage and Hour Law* is arbitrary and capricious. It imposes by legislative fiat one rigid, inflexible standard upon all industries without regard to local and occupational problems. The only permissible pattern of wage legislation is demonstrated in *West Coast*

Hotel Co. v. Parrish. Due process requires reasonable classification to meet individual problems. Due process also requires adequate investigation before imposition of the will of the legislature.

Accordingly, appellee submits tha the *Fair Labor Standards Act* is unconstitutional for the reasons outlined in this brief, and that the Court should affirm the judgment of the District Court.

Respectfully submitted,

ARCHIBALD B. LOVETT,
R. BASIL MORRIS,
ROBERT M. HITCH, JR.,
MALBERRY SMITH, JR.,
Attorneys for Appellee.

17 Drayton Street,
Savannah, Georgia.

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SUPREME COURT OF THE UNITED STATES.

No. 82.—October Term, 1940.

The United States of America, Appellant, *vs.* ~~F. W. Darby Lumber Company and~~ Fred W. Darby.	Appeal from the District Court of the United States for the Southern District of Georgia.

[February 3, 1941.]

Mr. Justice Stone delivered the opinion of the Court.

The two principal questions raised by the record in this case are, *first*, whether Congress has constitutional power to prohibit the shipment in interstate commerce of lumber manufactured by employees whose wages are less than a prescribed minimum or whose weekly hours of labor at that wage are greater than a prescribed maximum; and, *second*, whether it has power to prohibit the employment of workmen in the production of goods "for interstate commerce" at other than prescribed wages and hours. A subsidiary question is whether in connection with such prohibitions Congress can require the employer subject to them to keep records showing the hours worked each day and week by each of his employees including those engaged "in the production and manufacture of goods to wit, lumber, for 'interstate commerce.'"

Appellee demurred to an indictment found in the district court for southern Georgia charging him with violation of § 15 (a) (1) and (2) and (5) of the Fair Labor Standards Act of 1938; 52 Stat. 1060, 29 U. S. C. § 201, *et seq.* The district court sustained the demurrer and quashed the indictment and the case comes here on direct appeal under § 238 of the Judicial Code as amended, 28 U. S. C. § 345, and § 682, Title 18 U. S. C., 34 Stat. 1246, which authorizes an appeal to this Court when the judgment sustaining the demurrer "is based upon the validity or construction of the statute upon which the indictment is founded."

The Fair Labor Standards Act set up a comprehensive legislative scheme for preventing the shipment in interstate commerce of certain products and commodities produced in the United States under

labor conditions as respects wages and hours which fail to conform to standards set up by the Act. Its purpose, as we judicially know from the declaration of policy in § 2(a) of the Act,[1] and the reports of Congressional committees proposing the legislation, S. Rept. No. 884, 75th Cong. 1st Sess.; H. Rept. No. 1452, 75th Cong. 1st Sess.; H. Rept. No. 2182, 75th Cong. 3d Sess., Conference Report, H. Rept. No. 2738, 75th Cong. 3d Sess., is to exclude from interstate commerce goods produced for the commerce and to prevent their production for interstate commerce, under conditions detrimental to the maintenance of the minimum standards of living necessary for health and general well-being; and to prevent the use of interstate commerce as the means of competition in the distribution of goods so produced, and as the means of spreading and perpetuating such substandard labor conditions among the workers of the several states. The Act also sets up an administrative procedure whereby those standards may from time to time be modified generally as to industries subject to the Act or within an industry in accordance with specified standards, by an administrator acting in collaboration with "Industry Committees" appointed by him.

Section 15 of the statute prohibits certain specified acts and § 16(a) punishes willful violation of it by a fine of not more than $10,000 and punishes each conviction after the first by imprisonment of not more than six months or by the specified fine or both. Section 15(1) makes unlawful the shipment in interstate commerce of any goods "in the production of which any employee was employed in violation of section 6 or section 7", which provide, among other things, that during the first year of operation of the Act a minimum wage of 25 cents per hour shall be paid to employees "engaged in [interstate] commerce or the production of goods for [interstate] commerce," § 6, and that the maximum hours

[1] Sec. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

Section 3(b) defines "commerce" as "trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof."

of employment for employees "engaged in commerce or the production of goods for commerce" without increased compensation for overtime, shall be forty-four hours a week. § 7.

Section 15(a)(2) makes it unlawful to violate the provisions of §§ 6 and 7 including the minimum wage and maximum hour requirements just mentioned for employees engaged in production of goods for commerce. Section 15(a)(5) makes it unlawful for an employer subject to the Act to violate § 11(c) which requires him to keep such records of the persons employed by him and of their wages and hours of employment as the administrator shall prescribe by regulation or order.

The indictment charges that appellees are engaged, in the state of Georgia, in the business of acquiring raw materials, which they manufacture into finished lumber with the intent, when manufactured, to ship it in interstate commerce to customers outside the state, and that they do in fact so ship a large part of the lumber so produced. There are numerous counts charging appellees with the shipment in interstate commerce from Georgia to points outside the state of lumber in the production of which, for interstate commerce, appellees have employed workmen at less than the prescribed minimum wage or more than the prescribed maximum hours without payment to them of any wage for overtime. Other counts charge the employment by appellees of workmen in the production of lumber for interstate commerce at wages of less than 25 cents an hour or for more than the maximum hours per week without payment to them of the prescribed overtime wage. Still another count charges appellees with failure to keep records showing the hours worked each day a week by each of their employees as required by § 11(c) and the regulation of the administrator, Title 29, Ch. 5, Code of Federal Regulations, Part 516, and also that appellees unlawfully failed to keep such records of employees engaged "in the production and manufacture of goods, to-wit lumber, for interstate commerce".

The demurrer, so far as now relevant to the appeal, challenged the validity of the Fair Labor Standards Act under the Commerce Clause and the Fifth and Tenth Amendments. The district court quashed the indictment in its entirety upon the broad grounds that the Act, which it interpreted as a regulation of manufacture within the states, is unconstitutional. It declared that manufacture is not interstate commerce and that the regulation by the Fair Labor Standards Act of wages and hours of employment of those engaged

in the manufacture of goods which it is intended at the time of production "may or will be" after production "sold in interstate commerce in part or in whole" is not within the congressional power to regulate interstate commerce.

The effect of the court's decision and judgment are thus to deny the power of Congress to prohibit shipment in interstate commerce of lumber produced for interstate commerce under the proscribed substandard labor conditions of wages and hours, its power to penalize the employer for his failure to conform to the wage and hour provisions in the case of employees engaged in the production of lumber which he intends thereafter to ship in interstate commerce in part or in whole according to the normal course of his business and its power to compel him to keep records of hours of employment as required by the statute and the regulations of the administrator.

The case comes here on assignments by the Government that the district court erred insofar as it held that Congress was without constitutional power to penalize the acts set forth in the indictment, and appellees seek to sustain the decision below on the grounds that the prohibition by Congress of those Acts is unauthorized by the commerce clause and is prohibited by the Fifth Amendment. The appeals statute limits our jurisdiction on this appeal to a review of the determination of the district court so far only as it is based on the validity or construction of the statute. *United States* v. *Borden Co.*, 308 U. S. 188, 193-195, and cases cited. Hence we accept the district court's interpretation of the indictment and confine our decision to the validity and construction of the statute.

The prohibition of shipment of the proscribed goods in interstate commerce. Section 15(a)(1) prohibits, and the indictment charges, the shipment in interstate commerce, of goods produced for interstate commerce by employees whose wages and hours of employment do not conform to the requirements of the Act. Since this section is not violated unless the commodity shipped has been produced under labor conditions prohibited by § 6 and § 7, the only question arising under the commerce clause with respect to such shipments is whether Congress has the constitutional power to prohibit them.

While manufacture is not of itself interstate commerce the shipment of manufactured goods interstate is such commerce and

the prohibition of such shipment by Congress is indubitably a regulation of the commerce. The power to regulate commerce is the power "to prescribe the rule by which commerce is governed". *Gibbons* v. *Ogden*, 9 Wheat. 1, 196. It extends not only to those regulations which aid, foster and protect the commerce, but embraces those which prohibit it. *Reid* v. *Colorado*, 187 U. S. 137; *Lottery Case*, 188 U. S. 321; *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366; *Hoke* v. *United States*, 227 U. S. 308; *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311; *United States* v. *Hill*, 248 U. S. 420; *McCormick & Co.* v. *Brown*, 286 U. S. 131. It is conceded that the power of Congress to prohibit transportation in interstate commerce includes noxious articles, *Lottery Case*, *supra*; *Hipolite Egg Co.* v. *United States*, 220 U. S. 45; cf. *Hoke* v. *United States*, *supra*; stolen articles, *Brooks* v. *United States*, 267 U. S. 432; kidnapped persons, *Gooch* v. *United States*, 297 U. S. 124, and articles such as intoxicating liquor or convict made goods, traffic in which is forbidden or restricted by the laws of the state of destination. *Kentucky Whip & Collar Co.* v. *Illinois Central R. R. Co.*, 299 U. S. 334.

But it is said that the present prohibition falls within the scope of none of these categories; that while the prohibition is nominally a regulation of the commerce its motive or purpose is regulation of wages and hours of persons engaged in manufacture, the control of which has been reserved to the states and upon which Georgia and some of the states of destination have placed no restriction; that the effect of the present statute is not to exclude the prescribed articles from interstate commerce in aid of state regulation as in *Kentucky Whip & Collar Co.* v. *Illinois Central R. R. Co.*, *supra*, but instead, under the guise of a regulation of interstate commerce, it undertakes to regulate wages and hours within the state contrary to the policy of the state which has elected to leave them unregulated.

The power of Congress over interstate commerce "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed by the Constitution." *Gibbons* v. *Ogden*, *supra*, 196. That power can neither be enlarged nor diminished by the exercise or non-exercise of state power. *Kentucky Whip & Collar Co.* v. *Illinois Central R. R. Co.*, *supra*. Congress, following its own conception of public policy concerning the restrictions which may appropriately be imposed on interstate commerce, is free to exclude from the commerce articles whose use in the

states for which they are destined it may conceive to be injurious to the public health, morals or welfare, even though the state has not sought to regulate their use. *Reid* v. *Colorado, supra; Lottery Case, supra; Hipolite Egg Co.* v. *United States, supra; Hoke* v. *United States, supra.*

Such regulation is not a forbidden invasion of state power merely because either its motive or its consequence is to restrict the use of articles of commerce within the states of destination and is not prohibited unless by other Constitutional provisions. It is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states. *Seven Cases* v. *United States,* 239 U. S. 510, 514; *Hamilton* v. *Kentucky Distilleries & Warehouse Co.,* 251 U. S. 146, 156; *United States* v. *Carolene Products Co.,* 304 U. S. 144, 147; *United States* v. *Appalachian Electric Power Co.,* No. 12, decided December 16, 1940.

The motive and purpose of the present regulation is plainly to make effective the Congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the states from and to which the commerce flows. The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control. *McCray* v. *United States,* 195 U. S. 27; *Sonzinsky* v. *United States,* 300 U. S. 506, 513 and cases cited. "The judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged power". *Veazie Bank* v. *Fenno,* 8 Wall. 533. Whatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause. Subject only to that limitation, presently to be considered, we conclude that the prohibition of the shipment interstate of goods produced under the forbidden substandard labor conditions is within the constitutional authority of Congress.

In the more than a century which has elapsed since the decision of *Gibbons* v. *Ogden,* these principles of constitutional interpretation have been so long and repeatedly recognized by this Court as applicable to the Commerce Clause, that there would be little occasion for

repeating them now were it not for the decision of this Court twenty-two years ago in *Hammer* v. *Dagenhart*, 247 U. S. 251. In that case it was held by a bare majority of the Court over the powerful and now classic dissent of Mr. Justice Holmes setting forth the fundamental issues involved, that Congress was without power to exclude the products of child labor from interstate commerce. The reasoning and conclusion of the Court's opinion there cannot be reconciled with the conclusion which we have reached, that the power of Congress under the Commerce Clause is plenary to exclude any article from interstate commerce subject only to the specific prohibitions of the Constitution.

Hammer v. *Dagenhart* has not been followed. The distinction on which the decision was rested that Congressional power to prohibit interstate commerce is limited to articles which in themselves have some harmful or deleterious property—a distinction which was novel when made and unsupported by any provision of the Constitution—has long since been abandoned. *Brooks* v. *United States, supra; Kentucky Whip & Collar Co.* v. *Illinois Central R. Co., supra; Electric Bond & Share Co.* v. *Securities & Exchange Commission*, 303 U. S. 419; *Mulford* v. *Smith*, 307 U. S. 38. The thesis of the opinion that the motive of the prohibition or its effect to control in some measure the use or production within the states of the article thus excluded from the commerce can operate to deprive the regulation of its constitutional authority has long since ceased to have force. *Reid* v. *Colorado, supra; Lottery Case, supra; Hipolite Egg Co.* v. *United States, supra; Seven Cases* v. *United States, supra*, 514; *Hamilton* v. *Kentucky Distilleries & Warehouse Co., supra*, 156; *United States* v. *Carolene Products Co., supra*, 147. And finally we have declared "The authority of the federal government over interstate commerce does not differ in extent or character from that retained by the states over intrastate commerce". *United States* v. *Rock Royal Cooperative, Inc.*, 307 U. S. 533, 569.

The conclusion is inescapable that *Hammer* v. *Dagenhart*, was a departure from the principles which have prevailed in the interpretation of the commerce clause both before and since the decision and that such vitality, as a precedent, as it then had has long since been exhausted. It should be and now is overruled.

Validity of the wage and hour requirements. Section 15(a)(2) and §§ 6 and 7 require employers to conform to the wage and hour

provisions with respect to all employees engaged in the production of goods for interstate commerce. As appellees' employees are not alleged to be "engaged in interstate commerce" the validity of the prohibition turns on the question whether the employment, under other than the prescribed labor standards, of employees engaged in the production of goods for interstate commerce is so related to the commerce and so affects it as to be within the reach of the power of Congress to regulate it.

To answer this question we must at the outset determine whether the particular acts charged in the counts which are laid under § 15(a)(2) as they were construed below, constitute "production for commerce" within the meaning of the statute. As the Government seeks to apply the statute in the indictment, and as the court below construed the phrase "produced for interstate commerce", it embraces at least the case where an employer engaged, as are appellees, in the manufacture and shipment of goods in filling orders of extrastate customers, manufactures his product with the intent or expectation that according to the normal course of his business all or some part of it will be selected for shipment to those customers.

Without attempting to define the precise limits of the phrase, we think the acts alleged in the indictment are within the sweep of the statute. The obvious purpose of the Act was not only to prevent the interstate transportation of the proscribed product, but to stop the initial step toward transportation, production with the purpose of so transporting it. Congress was not unaware that most manufacturing businesses shipping their product in interstate commerce make it in their shops without reference to its ultimate destination and then after manufacture select some of it for shipment interstate and some intrastate according to the daily demands of their business, and that it would be practically impossible, without disrupting manufacturing businesses, to restrict the prohibited kind of production to the particular pieces of lumber, cloth, furniture or the like which later move in interstate rather than intrastate commerce. Cf. *United States* v. *New York Central R. R. Co.*, 272 U. S. 457, 464.

The recognized need of drafting a workable statute and the well known circumstances in which it was to be applied are persuasive of the conclusion, which the legislative history supports, S. Rept. No. 884 75th Cong. 1st Sess., pp. 7 and 8; H. Rept. No. 2738, 75th Cong.

3d Sess., p. 17, that the "production for commerce" intended includes at least production of goods, which, at the time of production, the employer, according to the normal course of his business, intends or expects to move in interstate commerce although, through the exigencies of the business, all of the goods may not thereafter actually enter interstate commerce.[2]

There remains the question whether such restriction on the production of goods for commerce is a permissible exercise of the commerce power. The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce. See *McCulloch* v. *Maryland*, 4 Wheat. 316, 421. Cf. *United States* v. *Ferger*, 250 U. S. 199.

While this Court has many times found state regulation of interstate commerce, when uniformity of its regulation is of national concern, to be incompatible with the Commerce Clause even though Congress has not legislated on the subject, the Court has never implied such restraint on state control over matters intrastate not deemed to be regulations of interstate commerce or its instrumentalities even though they affect the commerce. *Minnesota Rate Cases*, 230 U. S. 352, 398 *et seq.*, and cases cited; 410 *et seq.*, and cases cited. In the absence of Congressional legislation on the subject state laws which are not regulations of the commerce itself or its instrumentalities are not forbidden even though they affect interstate commerce. *Kidd* v. *Pearson*, 128 U. S. 1; *Bacon* v. *Illinois*, 227 U. S. 504; *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245; *Oliver Iron Co.* v. *Lord*, 262 U. S. 172.

But it does not follow that Congress may not by appropriate legislation regulate intrastate activities where they have a substantial effect on interstate commerce. See *Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board*, 303 U. S. 453, 466. A recent example is the National Labor Relations Act for the regulation of employer and employee relations in industries in which strikes, induced by unfair labor practices named in the Act, tend to disturb or obstruct interstate commerce. See *National Labor Relations*

[2] Cf. Administrator's Opinion, Interpretative Bulletin No. 5, 1940 Wage and Hour Manual, p. 131 *et seq.*

Board v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 38, 40; *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601, 604, and cases cited. But long before the adoption of the National Labor Relations Act this Court had many times held that the power of Congress to regulate interstate commerce extends to the regulation through legislative action of activities intrastate which have a substantial effect on the commerce or the exercise of the Congressional power over it.[3]

In such legislation Congress has sometimes left it to the courts to determine whether the intrastate activities have the prohibited effect on the commerce, as in the Sherman Act. It has sometimes left it to an administrative board or agency to determine whether the activities sought to be regulated or prohibited have such effect, as in the case of the Interstate Commerce Act, and the National Labor Relations Act or whether they come within the statutory definition of the prohibited Act as in the Federal Trade Commission Act. And sometimes Congress itself has said that a particular activity affects the commerce as it did in the present act, the Safety Appliance Act and the Railway Labor Act. In passing on the validity of legislation of the class last mentioned the only function of courts is to determine whether the particular activity regulated or prohibited is within the reach of the federal power. See *United States* v. *Ferger, supra; Virginian R. Co.* v. *Federation*, 300 U. S. 515, 553.

Congress, having by the present Act adopted the policy of excluding from interstate commerce all goods produced for the commerce which do not conform to the specified labor standards, it may choose the means reasonably adapted to the attainment of the per-

[3] It may prohibit wholly intrastate activities which, if permitted, would result in restraint of interstate commerce. Coronado Coal Co. *v.* United Mine Workers, 268 U. S. 295, 310; Local 167 *v.* United States, 291 U. S. 293, 297. It may regulate the activities of a local grain exchange shown to have an injurious effect on interstate commerce. Chicago Board of Trade *v.* Olsen, 262 U. S. 1. It may regulate intrastate rates of interstate carriers where the effect of the rates is to burden interstate commerce. Houston, E. & W. Texas Ry. Co. *v.* United States, 234 U. S. 342; Railroad Commission of Wisconsin *v.* Chicago, Burlington & Quincy R. Co., 257 U. S. 563; United States *v.* Louisiana, 290 U. S. 70, 74; Florida *v.* United States, 295 U. S. 1. It may compel the adoption of safety appliances on rolling stock moving intrastate because of the relation to and effect of such appliances upon interstate traffic moving over the same railroad. Southern Ry. Co. *v.* United States, 222 U. S. 20. It may prescribe maximum hours for employees engaged in intrastate activity connected with the movement of any train, such as train dispatchers and telegraphers. Baltimore & Ohio R. R. Co. *v.* Interstate Commerce Commission, 221 U. S. 612, 619.

mitted end, even though they involve control of intrastate activities. Such legislation has often been sustained with respect to powers, other than the commerce power granted to the national government, when the means chosen, although not themselves within the granted power, were nevertheless deemed appropriate aids to the accomplishment of some purpose within an admitted power of the national government. See *Ruppert* v. *Caffey*, 251 U. S. 264; *Everard's Breweries* v. *Day*, 265 U. S. 545, 560; *Westfall* v. *United States*, 274 U. S. 256, 259. As to state power under the Fourteenth Amendment, compare *Otis* v. *Parker*, 187 U. S. 606, 609; *St. John* v. *New York*, 201 U. S. 633; *Purity Extract and Tonic Company* v. *Lynch*, 226 U. S. 192, 201-202. A familiar like exercise of power is the regulation of intrastate transactions which are so commingled with or related to interstate commerce that all must be regulated if the interstate commerce is to be effectively controlled. *Shreveport Case*, 234 U. S. 342; *Wisconsin Railroad Comm'n* v. *Chicago, B. & Q. R. R. Co.*, 257 U. S. 563; *United States* v. *New York Central R. R. Co.*, *supra*, 464; *Currin* v. *Wallace*, 306 U. S. 1; *Mulford* v. *Smith*, *supra*. Similarly Congress may require inspection and preventive treatment of all cattle in a disease infected area in order to prevent shipment in interstate commerce of some of the cattle without the treatment. *Thornton* v. *United States*, 271 U. S. 414. It may prohibit the removal, at destination, of labels required by the Pure Food & Drugs Act to be affixed to articles transported in interstate commerce. *McDermott* v. *Wisconsin*, 228 U. S. 115. And we have recently held that Congress in the exercise of its power to require inspection and grading of tobacco shipped in interstate commerce may compel such inspection and grading of all tobacco sold at local auction rooms from which a substantial part but not all of the tobacco sold is shipped in interstate commerce. *Currin* v. *Wallace*, *supra*, 11, and see to the like effect *United States* v. *Rock Royal Co-op.*, *supra*, 568, note 37.

We think also that § 15(a)(2), now under consideration, is sustainable independently of § 15(a)(1), which prohibits shipment or transportation of the proscribed goods. As we have said the evils aimed at by the Act are the spread of substandard labor conditions through the use of the facilities of interstate commerce for competition by the goods so produced with those produced under the prescribed or better labor conditions; and the consequent disloca-

tion of the commerce itself caused by the impairment or destruction of local businesses by competition made effective through interstate commerce. The Act is thus directed at the suppression of a method or kind of competition in interstate commerce which it has in effect condemned as "unfair", as the Clayton Act has condemned other "unfair methods of competition" made effective through interstate commerce. See *Van Camp & Sons* v. *American Can Co.*, 278 U. S. 245; *Federal Trade Comm'n* v. *Keppel & Bro.*, 291 U. S. 304.

The Sherman Act and the National Labor Relations Act are familiar examples of the exertion of the commerce power to prohibit or control activities wholly intrastate because of their effect on interstate commerce. See as to the Sherman Act, *Northern Securities Company* v. *United States*, 193 U. S. 197; *Swift & Co.* v. *United States*, 196 U. S. 375; *United States* v. *Patten*, 226 U. S. 525; *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344; *Local No. 167* v. *United States*, 291 U. S. 293; *Stevens Co., et al.* v. *Foster & Kleiser Co., et al.*, No. 41, decided December 9, 1940. As to the National Labor Relations Act, see *National Labor Relations Board* v. *Fainblatt, supra*, and cases cited.

The means adopted by § 15(a)(2) for the protection of interstate commerce by the suppression of the production of the condemned goods for interstate commerce is so related to the commerce and so affects it as to be within the reach of the commerce power. See *Currin* v. *Wallace, supra*, 11. Congress, to attain its objective in the suppression of nationwide competition in interstate commerce by goods produced under substandard labor conditions, has made no distinction as to the volume or amount of shipments in the commerce or of production for commerce by any particular shipper or producer. It recognized that in present day industry, competition by a small part may affect the whole and that the total effect of the competition of many small producers may be great. See H. Rept. No. 2182, 75th Cong. 1st Sess., p. 7. The legislation aimed at a whole embraces all its parts. Cf. *National Labor Relations Board* v. *Fainblatt, supra*, 606.

So far as *Carter* v. *Carter Coal Co.*, 298 U. S. 238, is inconsistent with this conclusion, its doctrine is limited in principle by the decisions under the Sherman Act and the National Labor Relations Act, which we have cited and which we follow. See also *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381; *Currin* v. *Wal-*

lace, supra; Mulford v. *Smith, supra; United States* v. *Rock Royal Co-op., supra; Clover Fork Coal Co.* v. *National Labor Relations Board,* 97 F. (2d) 331; *National Labor Relations Board* v. *Crowe Coal Co.,* 104 F. (2d) 633; *National Labor Relations Board* v. *Good Coal Co.,* 110 F. (2d) 501.

Our conclusion is unaffected by the Tenth Amendment which provides: "The powers not delegated to the United States by the Constitution nor prohibited by it to the states are reserved to the states respectively or to the people". The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers. See e. g., II Elliot's Debates, 123, 131; III *id.* 450, 464, 600; IV *id.* 140, 149; I Annals of Congress, 432, 761, 767-768; Story, Commentaries on the Constitution, secs. 1907-1908.

From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end. *Martin* v. *Hunter's Lessee,* 1 Wheat. 304, 324, 325; *McCulloch* v. *Maryland, supra,* 405, 406; *Gordon* v. *United States,* 117 U. S. 697, 705; *Lottery Case, supra; Northern Securities Co.* v. *United States, supra,* 344-345; *Everard's Breweries* v. *Day, supra,* 558; *United States* v. *Sprague,* 282 U. S. 716, 733; see *United States* v. *The Brigantine William,* 28 Fed. Cas. No. 16,700, p. 622. Whatever doubts may have arisen of the soundness of that conclusion they have been put at rest by the decisions under the Sherman Act and the National Labor Relations Act which we have cited. See also, *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 330-331; *Wright* v. *Union Central Ins. Co.,* 304 U. S. 502, 516.

Validity of the requirement of records of wages and hours. § 15(a)(5) and § 11(c). These requirements are incidental to those for the prescribed wages and hours, and hence validity of the former turns on validity of the latter. Since, as we have held, Congress

"of not less than one and one-half times the regular rate" at which the worker is employed.

may require production for interstate commerce to conform to those conditions, it may require the employer, as a means of enforcing the valid law, to keep a record showing whether he has in fact complied with it. The requirement for records even of the intrastate transaction is an appropriate means to the legitimate end. See *Baltimore & Ohio R. Co.* v. *Interstate Commerce Commission*, 221 U. S. 612; *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194; *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1, 42.

Validity of the wage and hour provisions under the Fifth Amendment. Both provisions are minimum wage requirements compelling the payment of a minimum standard wage with a prescribed increased wage for overtime. Since our decision in *West Hotel Co.* v. *Parrish*, 300 U. S. 379, it is no longer open to question that the fixing of a minimum wage is within the legislative power and that the bare fact of its exercise is not a denial of due process under the Fifth more than under the Fourteenth Amendment. Nor is it any longer open to question that it is within the legislative power to fix maximum hours. *Holden* v. *Hardy*, 169 U. S. 366; *Muller* v. *Oregon*, 208 U. S. 412; *Bunting* v. *Oregon, supra; Baltimore & Ohio R. Co.* v. *Interstate Commerce Commission, supra.* Similarly the statute is not objectionable because applied alike to both men and women. Cf. *Bunting* v. *Oregon*, 243 U. S. 426.

The Act is sufficiently definite to meet constitutional demands. One who employs persons, without conforming to the prescribed wage and hour conditions, to work on goods which he ships or expects to ship across state lines, is warned that he may be subject to the criminal penalties of the Act. No more is required. *Nash* v. *United States*, 229 U. S. 373, 377.

We have considered, but find it unnecessary to discuss other contentions.

Reversed.

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